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NOTES OF RECENT CASES.

Ramesam, J. C.R.P. No. 230 of 1931.
3rd May, 1932.

Civil Procedure Code (V of 1908), *S.* 141 *and O.* 9, *R.* 9—*Application for leave to sue* in forma pauperis—*Dismissal for default—Whether Court has jurisdiction to restore it.*

When an application for leave to sue as a pauper came on for hearing and it was dismissed for default, the Court had jurisdiction to restore the same under O. 9, R. 9 read with S. 141 of the Civil Procedure Code (V of 1908).

M. S. Vaidyanatha Aiyar for Petitioner.

P. J. Kuppanna Rao for Respondent.

K.C.

Curgenven and Sundaram Chetty, JJ. A.S. No. 261 of 1925.
4th May, 1932.

Evidence Act (I of 1872), *Ss.* 32, 35 *and* 74—*Official correspondence—Office copy—Pedigree maintained by family priest—Admissibility.*

A certified copy of an office copy maintained in registers of official correspondence is admissible in evidence under S. 35 read with S. 74 of the Evidence Act.

40 Mad. 871 and 2 Mad. 128 (P.C.) relied on.

Pedigrees maintained by family gurus or priests for their own use or for the use of the family are admissible in evidence under S. 32 of the Evidence Act even if the guru or priest who prepared the same is dead.

46 Bom. 753 and 46 All. 665 followed.

T. Rangachariar and *A. Lakshmiah* for Appellants.

S. Varadachariar and *V. Suryanarayana* for Respondents.

B.V.V.

Curgenven, J.
11th May, 1932.

C.R.P. No. 1768 of 1928
and
C.M.P. No. 1627 of 1929.

Civil Procedure Code (*V of* 1908), *O.* 41, *Rr.* 20, 22—*Practice —Addition of party respondent after time—Power of Appellate or Revisional Court—Object of such addition to enable the preferring of a memorandum of cross-objections—Power of Revisional Court to entertain a memorandum of cross-objections.*

An Appellate or Revisional Court has no power to add a party respondent after time under O. 41, R. 20 with a view to facilitating the filing of a memorandum of objection against him. The High Court has no power to entertain the memorandum of objections in a Civil Revision Petition.

1929 M.W.N 381; 53 Cal 270 and A.I.R. 1928 Mad. 794 referred to.

C. A. Seshagiri Sastri for Petitioner.

V. K. Srinivasa Aiyar for Respondent.

T. S. Vaidyanatha Aiyar and *G. Gopalaswami Aiyar* for Respondents in C.M.P. No. 1627 of 1929.

K.C.

Beasley, C.J.
12th May, 1932.

C.R.P. No. 349 of 1929.

Civil Procedure Code (*V of* 1908), *S.* 73—*First decree against two brothers—Second decree against one of them—Sale of properties in execution of decree against both brothers—Second decree-holder only entitled to rateable distribution against share of the brother against whom his decree was obtained.*

Where a decree is obtained against a joint family composed of two brothers and the sons of one of them, and there is another decree against one of the brothers alone and the joint family properties are sold in execution of the first decree, the second decree-holder is entitled to rateable distribution due in respect of the share of the brother against whom he got the decree and not in respect of the whole sale-proceeds.

54 M. L. J. 278 followed.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan for Respondent.

K.C.

Sundaram Chetty, J. S. A. No. 516 of 1929.
26th July, 1932.

Negotiable Instruments Act (*XXVI of* 1881), *S.* 17—*Stamp Act, Ss.* 6, 35, 36 *and* 42 (2)—*Negotiable instrument—Holder's right to elect under S.* 17, *whether taken away by S.* 6 *of Stamp Aqt* (*II of* 1899)—*Document—Admissibility—Appellate Court's right to refuse to act upon it after once admitted in evidence, whether permissible—Scope of S.* 42 (2).

The right of election given under S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of exchange is a privilege which he must have the full advantage of, and that benefit cannot be taken away by the provision contained in S. 6 of the Stamp Act which requires that when an instrument comes within two or three descriptions chargeable with duties differently, it should be charged only with the highest of such duties.

It would be reasonable to regard S. 17 of Negotiable Instruments Act as a proviso to S. 6 of the Stamp Act.

Once a document has been admitted in evidence by the Lower Court under S. 35 of the Stamp Act, such admission cannot be questioned at any later stage of the suit or proceeding on the ground that the instrument has not been duly stamped and the natural consequence of that admission must also follow. The Appellate Court cannot say that it is only precluded from questioning the admission of such an instrument, but that it is at liberty not to act upon it, viz., it would not look into it and would not make use of it in the appreciation of evidence or would not allow a decree to be passed on the document.

27 C.W.N. 513 and 53 Cal. 515 referred to.

Section 42 (2) of the Stamp Act has no application to a case where no duty and penalty have been levied by the Lower Court but the document itself is treated as duly stamped by the Lower Court.

S. Varadachariar and *V. Ramaswami Aiyar* for Appellant.

M. Patanjali Sastri and *A. Nagaswami Aiyar* for Respondents.

K.C.

Sundaram Chetty, J. S. A. Nos. 1088 to 1092 of 1930.
28th July, 1932.

Civil Procedure Code (*V of* 1908), *S.* 11—*Identity of parties —Municipal Council and Chairman of Municipality—Prior decision being erroneous in law—Matter whether can be re-agitated.*

In a prior suit filed against a Municipal Council the owners of a rice mill had obtained a declaration and injunction regarding their non-liability for a certain licence fee. The Chairman of the Municipality subsequently sued the plaintiff in the prior suit for a declaration that they were liable for the fee.

N.R.C.

Held, that there was a legal identity of parties having regard to the sections of the Madras District Municipalities Act and that the prior decision operated as ***res judicata.***

If the former decision on a question of law is found to be erroneous, the same question can be re-agitated and another decision may be given, but without affecting the rights already acquired under the erroneous view of the law in the prior suit.

56 Cal. 723 relied on.

V. Ramaswami Aiyar for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. C.M.S.A. No. 178 of 1930.
1st August, 1932.

Limitation Act (IX of 1908), *Art.* 182, *cl.* (5)—*Amending Act IX of* 1927—*Starting point for execution when no final order was passed on execution application.*

Where a second execution application, filed after the Amending Act IX of 1927, was returned for correction of some errors and a third application was filed and along with this application the second application was re-presented and it was contended that there having been no final order on the second application, it was to be ignored and the third application having been more than three years after the first application, it was barred by limitation.

Held, that there having been no final order on the second application, it had to be regarded as still pending, that the question of limitation did not arise and that the Court would have to pass final orders on second application and then should, if necessary, consider whether third application was in time or not.

C.R.P. No. 5 of 1930, Judgment of Jackson, J., referred to.

T. M. Krishnaswami Aiyar, R. Somasundaram Aiyar and *V. K. Srinivasa Aiyangar* for Appellant.

C. S. Venkatachariar and *K. S. Narayana Aiyangar* for Respondents.

K.C.

Jackson and Mockett, JJ. S. A. No. 1060 of 1928.
2nd August, 1932.

Sale of goods—Breach of contract—Mixing goods of inferior quality—Right of buyer to repudiate contract—Waiver—Seller's omission to tender goods—Refund of advance paid with interest.

In pursuance of a contract for the sale of sixty bales of yarn the seller tendered twenty-eight bales which were taken delivery of by the buyers. Nine bales were subsequently tendered and rejected but the balance was never tendered. It appeared that out of nine bales tendered three were of defective quality but the buyers instead of bringing that fact to the notice of the sellers repudi-

ated the contract in its entirety. The buyers having sued for a return of the advance made to the sellers with interest in respect of the thirty-two bales which they had not taken delivery,

Held, that the conduct of the buyer in respect of the three bales amounted to a waiver of the conditions precedent to acceptance, that he could not later on raise the plea that on account of the defect of quality he was justified in rejecting the nine bales and therefore he was not entitled to a refund of the advance in respect of those bales.

(1905) 2 K.B. 543, (1923) A.C. 48, 49 M.L.J. 1 and 49 M. 781 referred to.

Held, however, that the sellers, having elected to keep the contract alive so far as the remaining twenty-three bales were concerned, were in fault in not having tendered them and the buyer was consequently entitled to a return of the earnest money with interest on account of those bales.

T. R. Venkatarama Sastri and *N. Rajagopala Aiyangar* for Appellants.

Nugent Grant instructed by *T. Krishnaswami Aiyangar* and *S. K. Narasimhachari* for Respondents.

B.V.V.

Burn, J. Cr. R. C. No. 206 of 1932.

2nd August, 1932.

Criminal Procedure Code (V of 1898 as amended), S. 539-B—Local inspection by Magistrate—Memorandum of relevant facts—Omission to make—Effect.

Where a Magistrate did not make any memorandum of the relevant facts observed by him at the inspection and it was shown that the accused had been prejudiced on that account,

Held, that the proceedings were vitiated.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioner.

The Public Prosecutor (L. H. Bewes) for the Crown.

Y. Suryanarayana for Respondent.

B.V.V.

Madhavan Nair, J. C.M.S.A. No. 129 of 1930.

2nd August, 1932.

Insolvency—Hindu joint family—Adjudication of father—Rights of Official Receiver—Collection of rents of family properties for payment of binding debts.

On the insolvency of a father in a Hindu joint family the shares of the sons do not vest in the Official Receiver but so long as the debts are not immoral or illegal he has got the right to sell them. In fact, he is entitled to be in joint possession with the sons of all the family properties. And in the exercise of the rights of the manager which accrued to him he has a right to collect the rents from the shares belonging to the minor sons for the purpose of paying off the father's creditors.

46 M. 54, 49 M. 849, 51 M. 417 and 51 M. 567 referred to.

T. Krishna Rao for *B. Sitarama Rao* for Appellant.

M. A. T. Coelho for Respondent.

B.V.V.

Sundaram Chetty, J. S.A. No. 712 of 1930.

2nd August, 1932.

Hindu Law—Pre-nuptial settlement—Construction of—Absolute estate subject to defeasance clause, whether permissible—Gift-over clause when void as repugnant and when operative as valid defeasance clause—Devisee's right not affected by a donee's alienation or compromise—Subsequent adoption by husband not divesting estate vested on wife's death.

A pre-nuptial settlement by a husband in favour of his wife was in the following terms: "I have given you the undermentioned properties and you may enjoy the same with full powers. If you have issue they shall enjoy it after our lifetime. If there be no issue after your death, your brothers should take the properties and enjoy them." Subsequent to the settlement in a litigation between the husband and wife in respect of settlement of properties, a razinama decree was passed whereby they divided the properties in certain shares to be enjoyed by them absolutely. The wife pre-deceased the husband who two months thereafter adopted a son. The wife's brothers claimed the properties under the gift-over clause on the ground that she died without issue.

Held, (1) that the estate settled upon the wife was an absolute one subject to defeasance on the happening of the specified contingency,

(2) that the defeasance clause was valid and operative and cut down the estate of the wife to a life-estate on the happening of the contingency.

6 M.I.A. 526, 9 M.I.A. 123 and 34 M. 250 followed.

59 C. 142 (P.C.) referred to.

31 I.C. 405 distinguished.

Distinction between repugnant clauses which are void and defeasance clauses which are valid pointed out.

(3) that the compromise by the wife being no more than an alienation could not be operative beyond her lifetime so as to affect the rights of the subsequent devisees, and

(4) that the subsequent adoption after the death of the donee does not operate to divest the estate vested in her brothers, as the contingency contemplated was only the death of the donee without issue at the time of her death.

B. Sitarama Rao and *J. R. Gundappa Rao* for Appellants.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondents.

K.C.

Madhavan Nair, J. C.M.A. Nos. 176 and 177 of 1930.
2nd August, 1932.

Res judicata—*Execution proceedings—Application by judgment-debtor to raise attachment on ground of the lands forming part of service inams—Previous order by District Munsif in suits regarding another portion of the same survey number as forming part of no service inams—Application to Collector and his ruling that they were service inams—Whether Collector's order could prevail over Civil Court's previous order—Whether present application barred as* res judicata.

The properties belonging to the judgment-debtors formed part of a certain land alleged to be service inam. In two mortgage suits against them, their share in the land being the subject of mortgage was brought to sale. The decree not having been fully satisfied the judgment-creditor got a personal decree against the judgment-debtors and attached the remaining portion of the lands within the same survey number The judgment-debtors filed an application under S. 47, Civil Procedure Code, to set aside the attachment on the ground that the lands were service inam. There was a previous order of the District Munsif in the execution proceedings of the mortgage suit, when the judgment-debtors filed an application under O. 21, R. 90, Civil Procedure Code, to set aside the sale alleging that the properties sold formed part of the service inam, dismissing the application on the ground that the lands though once service inam had been enfranchised or resumed and hence sale was valid. After that order the judgment-debtors applied to the Collector under S. 13 of Act III of 1895 and the Collector gave a ruling that the properties were service inam. On the questions whether the previous order of the District Munsif prevailed against that of the Collector and whether it could bar the present application as *res judicata,*

Held, (1) that the applicants having submitted themselves to the Civil Court first could not contend that the Collector's order would prevail;

(2) that the previous decision of the District Munsif in regard to the lands forming part of the same survey number as not service inam owing to subsequent enfranchisement, barred the present application.

49 M.L.J. 401 relied on.

B. T. M. Raghavachari for Appellant.

K. Kottayya for Respondent.

K.C.

Sundaram Chetty, J. S. A. No. 1114 of 1928.
5th August, 1932.

Madras Estates Land Act (I of 1908), *Ss.* 55, 112, 146—*Jurisdiction—Civil Court.*

N.R.C.

Plaintiff, a transferee from a registered pattadar, and who did not get a transfer of the patta, brought a suit in a Civil Court for a declaration that proceedings taken by the landholder under S. 112 of the Madras Estates Land Act were valid only in so far as they related to the arrear of rent due on the actual extent of the land and not on the extent as mentioned in the patta, it being admitted that the actual extent was less than that mentioned in the patta, and prayed for an injunction restraining the landholder from taking proceedings for the full amount due as per the patta.

The landholder contended that such a suit would not lie in a Civil Court.

Held, that the principle governing the case of this kind is that if the plaintiff had an effectual remedy by a suit or an application in a Revenue Court for averting the injury complained of, he should resort to that remedy and not seek it by means of a civil suit. In this case the plaintiff as purchaser, though his purchase was not recognised, could have filed a suit under S. 55 for a grant of a patta in such terms as he would be entitled to receive. 44 Mad. 43 followed. Or the plaintiff could have applied under S. 146 for a transfer of the patta and if the transferor would not join in an application under S. 146 he could have filed a suit in a Civil Court and have produced an order of the Civil Court establishing the transfer.

The plaintiff not showing any cause for the omission to have recourse to these proceedings the principle of the decision in 42 M.L.J. 113 has to be applied and the plaintiff cannot ask for the reliefs in a Civil Court by means of a suit. The suit is not therefore maintainable.

M. Venkatasubbiah for the *Advocate-General* (*A. Krishnaswami Aiyar*) for Appellant.

P. Srikantam for Respondent.

K.C.

Venkatasubba Rao and Reilly, JJ.
5th August, 1932.

C. M. A. No. 445 of 1928.

Mortgage—Suit upon simple mortgage—Appointment of Receiver—Simple money decree-holder purchasing the properties in execution of his decree subsequently—Receiver added as a party to his execution proceedings—Application by him for payment out of moneys in Court realised by Receiver for the period between date of his own purchase and the sale in execution of mortgage decree, whether maintainable.

In a suit for sale on a simple mortgage, the plaintiffs applied for appointment of a Receiver of the mortgaged properties and the Court appointed a Receiver to manage the properties and to pay the moneys realised into Court. Thereafter, a simple money decree-holder against the mortgagor who had already attached the mortgaged properties, applied to the Court for permission to add the Receiver as a party to his execution proceedings which was granted and in execution of his decree he purchased the properties. The plaintiffs in the mortgage suit added him as a party (9th defendant) to their suit; they applied for the continuance of the Receiver already appointed and for an injunction restraining the purchaser from taking possession till any decree that might be passed in the mortgage suit was satisfied and the applications were ordered. Subsequently a decree was passed in the mortgage suit and, in execution thereof, the properties were sold and the sale proceeds were not sufficient to discharge the mortgage decree. The 9th defendant applied for payment out to him of the moneys put into Court by the Receiver representing the income of the properties for the period between the date of his purchase and the date of sale in execution of the mortgage decree.

Held, that he was not entitled to the same on the ground that the order appointing a Receiver operated as an injunction restraining the judgment-debtor from himself receiving the moneys and that it prevented the debtor from dealing with them to the prejudice of the judgment-creditor and also prevented any subsequent judgment-creditor from gaining priority over the creditors obtaining the order.

(1903) 2 Ch. 727 followed.

22 Q.B.D. 187 distinguished as arising under the Bankruptcy Act under which all the properties of the debtor vest in the trustee.

Reilly, J. dissented from the statement in 47 C. 418 at 422 "Our attention has been invited to the case of *Penney* v. *Todd*[1] where it was ruled that the possession of a Receiver in a mortgaged suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver

1. (1878) 26 W. R. (Eng.) 502.

N.R.C.

who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well founded."

The analogy of English cases dealing with mortgages should be used with care.

K. V. Sesha Aiyangar for Appellant.

K. Bhashyam Aiyangar and *R. Visvanatha Aiyar* for Respondents.

K.C.

Sundaram Chetty, J. S. A. No. 965 of 1930.
5th August, 1932.

Madras Local Boards Act (XIV of 1920), *S.* 88—*Lessee from inamdar landholder holding both warams—More a tenant than intermediate landholder—Landholder entitled to recover one-half of land cess payable by him from lessee.*

The lessee from the inamdar landholder holding both the warams must be deemed to be more a tenant than an intermediate landholder for the purpose of S. 88 of the Madras Local Boards Act of 1920 and the landholder is entitled to recover one-half of the land cess payable by him from the lessee.

M. Patanjali Sastri and *A. Nagaswami Aiyar* for Appellants.

V. Rajagopala Aiyar and *T. V. Ramiah* for Respondents.

K.C.

Krishnan Pandalai, J., C. R. P. No. 1413 of 1928.
15th August, 1932.

Promissory note—Simultaneous execution of note along with the advance of loan—Maintainability of the suit on the consideration—Evidence Act, S. 91.

Where a promissory note is inadmissible in evidence for want of proper stamp, and the loan has been simultaneous with the execution of the note, no suit can lie on the basis of the loan.

38 Mad. 660, 20 L.W. 943, C.R.P. No. 1486 of 1928 (unreported) and 1932 M.W.N. 793 followed.

40 Mad. 727, 34 I.C. 417 and 98 I.C. 75 explained.

S. Nagaraja Aiyar for Petitioner.

K. Balasubramania Aiyar and *K. Chandrasekhara Aiyar* for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 882 of 1928.

15th August, 1932.

Civil Procedure Code (*V of* 1908), *S.* 102—*Suit for refund of profession tax and for injunction to restrain future levy—Whether a suit of a small cause nature—Second appeal from such a suit, if competent—Madras Local Boards Act* (*XIV of* 1920), *S.* 93—*Business carried on at Rangoon—Owner resident within Devakottah Taluk Board area—When assessable to profession tax.*

Where the plaint in a suit for the recovery of a sum below Rs. 500 collected as profession tax, the levy of which was questioned as illegal, also prayed for an injunction to restrain the defendant, Local Board, from levying similar tax for two succeeding years and a separate Court-fee was paid for the relief of injunction, and in second appeal from such a suit the objection was taken that the suit was of a small cause nature and that a second appeal was incompetent under S. 102, Civil Procedure Code,

Held, that the relief of injunction prayed for in the plaint was substantial relief and not merely ancillary to the relief of refund, and as such, the suit was exempted from the cognizance of a Small Causes Court and that the second appeal was competent.

I.L.R. 30 Mad. 101 and A.I.R. 1930 A. 702 distinguished

Under S. 93 of the Madras Local Boards Act 1920, a person residing within the area of a Taluk Board can be assessed to profession tax under the second head of that section, only if he is in receipt within the Taluk Board area of the income in respect of which he is sought to be assessed.

I.L R 43 Mad. 75 (F.B.), I.L.R. 46 Mad. 706 (S.B.), I.L.R. 45 Bom. 1286 and 63 M.L.J. 148 followed

Watrap S. Subramania Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

K.C.

Sundaram Chetty, J. C.R.P. No. 1147 of 1928.

15th August, 1932.

Madras Local Boards Act (*XIV of* 1920), *S.* 225—*Suit for refund of profession tax—Whether a suit for money had and received or a suit for compensation and damages—Period of limitation for such a suit—Whether six months or three years—Indian Limitation Act* (*IX of* 1908), *Art.* 62.

A suit for refund of profession tax illegally levied, is a suit for money had and received within the meaning of Art. 62 of the Limitation Act and not a suit for compensation or for damages

I.L.R. 52 Mad. 207 referred to.

Section 225 of the Madras Local Boards Act provides only for suits for compensation or damages in respect of acts done by the Local Board or its officers and not for any other classes of suits.

N.R.C.

I.L.R. 32 Mad. 371 (F.B.) and 60 M.L.J. 600 followed.

A.I.R. 1930 All. 365 not followed.

K. Rajah Aiyar for Petitioner.

Watrap S. Subramania Aiyar for Respondents.

K.C.

Venkatasubba Rao and Reilly, JJ. C.R.P. No. 790 of 1931.
19th August, 1932.

Abatement—Hindu Law—Partition suit on behalf of a minor coparcener—Death of minor before preliminary decree—Suit if abates or can be continued by his legal representative.

Pending a suit for partition filed by an infant with his mother as guardian, the infant died before the preliminary decree was passed therein. The mother applied to be brought on record as legal representative of the son to continue the suit. On a difference of opinion between the Judges, Reilly, J., holding that the consensus of judicial opinion was that the suit abates and Venkatasubba Rao, J., that it does not and that as held by Jackson, J. in A.I R. 1930 Mad. 486, it can be continued by the mother if the Court should find that the suit when filed was for the benefit of the minor, the following questions were referred to a Full Bench:—

(1) Does a suit by a minor for partition abate if he dies before the Court has found that the partition is for his benefit.

(2) Or is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor.

The scope and authority of precedents discussed by Reilly, J.

Case-law discussed.

S. Varadachariar and *B. T. M. Raghavachariar* for Petitioner.

G. Lakshmanna, G. Chandrasekara Sastri and *T. S. Narasinga Rao* for Respondent.

S.V.V.

Venkatasubba Rao and Reilly, JJ. C.M.A. No. 294 of 1928.
19th August, 1932.

Civil Procedure Code—Probate proceeding—Executor dying —If his sons can be added as legal representatives—Evidence Act, S. 41—If a judgment against a will is a judgment in rem.

An executor who was also a residuary legatee under the will applied for probate of the will. Caveat having been entered, the proceedings were contested and the first Court found against the will. Pending the appeal against it, the executor died and his sons applied to be brought on record.

Held, that the proceeding for grant of probate or Letters of Administration with a copy of the will annexed, is a representa-

tive one and the person who commenced it is to be regarded as having done so in his representative capacity and not in his individual capacity. The object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others interested in it, that the will propounded is genuine and valid. O. 22 does not apply to such a proceeding but the son must be treated as coming in as one entitled to intervene in the proceeding at any stage of it. The position of a petitioner for probate is not dissimilar to that of a plaintiff under O 1, R 8, Civil Procedure Code.

36 Cal. 799 and 45 Cal 862 distinguished as only discussing the applicability of O. 22, R. 3 and not the larger right as intervenors.

9 Pat. 698 and 35 C.W.N 1028 approved, though on different grounds.

Williams on Executors, 12th Ed., Vol. I, p. 213 relied on.

The question whether or not a judgment of a Probate Court, pronouncing against a will, amounts to a judgment *in rem* under S. 41 of Evidence Act left open

16. Mad. 380; 38 Bom. 309; 12 C L.J. 91 and 12 C.L J 185 referred to.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *M. Venkatasubbiah* for Appellants.

S. Varadachariar and *R. Rajagopala Aiyangar* for Respondent.

S.V.V.

Jackson, Sundaram Chetty and Mockett, JJ. S.A. No. 1118 of 1929.

22nd August, 1932.

Minor—Sale of minor's properties by guardian—Covenant clause to re-sell property to vendor or his heirs—Whether suit for specific performance maintainable by minor.

Where the father of a minor acting as his guardian sold his (minor's) property to another person and the sale-deed contained a covenant to the following effect that "if it happens that you (vendee) or your heirs have to sell the property to others, then you must sell it to the vendor or his heirs for the above price" and the minor on attaining majority sued for specific performance of the contract,

Held, (1) that the covenant to repurchase by the vendor was a concluded contract and not a mere standing offer.

51 M. 533 (P.C.) relied on.

1931 M W.N. 957 and 46 M. 30 doubted.

(2) That the contract to repurchase was void for want of mutuality, the vendor being a minor on the date of the contract, and hence could not be specifically enforced by him on his attaining majority, irrespective of the transaction being beneficial to him.

39 Cal. 232 (P.C.) followed.

40 M. 308 (F.B.) referred to.

K. Desikachari for Appellant.

Salem Ramaswami Aiyar for *T. Appaji Rao* for Respondents.

K.C.

Sundaram Chetty, J. S.A. Nos. 334 and 470 of 1930.
23rd August, 1932.

Riparian rights—Water-course—Artificial water-course from a natural stream—Rights of owners of land on its banks—If can claim riparian rights—Second appeal—Fact—Interference in.

Where an artificial channel takes its source from a natural water-course, it does not follow that the owners of lands on both sides of the artificial channel *ipso facto* secure riparian rights over it. Special circumstances may be shown to exist, *e.g.*, grant, user, etc., so as to confer all such rights as a riparian owner would have had in the case of a natural stream. Unless the owners of land on the banks establish circumstances under which the artificial channel was made and the manner it was used so as to give rise to an inference that they have all the rights of riparian owners as such, it cannot be contended that by reason alone of the artificial channel having been cut from a natural stream, the former becomes a natural stream so as to confer riparian rights on them.

2 Exch. 1 (*Nuttall* v. *Bracewell*) discussed.

32 L.J.Q.B 136; 43 I.C 235; 51 Bom. 243 and 3 Rang. 494 distinguished as cases where such circumstances existed to confer riparian rights.

If by reason of a misconstruction of an important document the Courts below come to an erroneous finding on a question of fact, this Court can interfere in second appeal.

Ch. Raghava Rao for Appellant in S.A. No. 334 of 1930.

T. M. Krishnaswami Aiyar and *M. Appa Rao* for Appellant in S.A. No. 470 of 1930.

P. Venkataramana Rao and *K. Subba Rao* for Respondents.

S.V.V.

Sundaram Chetty, J. S. A. No. 72 of 1930.
23rd August, 1932.

Civil Procedure Code (V of 1908), *S.* 92—*Suit by co-trustee for scheme for management by rotation among the trustees—Kattalai trust—Will by founder—No direction therein for management by rotation—Sanction if necessary under S.* 92.

Under a will by the founder of a kattalai trust, the right of management was conferred on his male heirs but there was no direction as to management by the heirs. One of the trustees filed a suit for a declaration that he was entitled to joint management of the trust under the will and for a scheme of exclusive management by each trustee for one year by rotation. No sanction was obtained under S. 92, Civil Procedure Code, for the filing of the suit.

Held, that S. 92 was a bar to the maintainability of the suit in respect of the prayer for the scheme.

55 Cal. 519 at 529 (P.C.) relied on.

45 Mad. 113 at 116 (F.B.) referred to.

A. I. R. 1927 Mad. 948 distinguished as already containing a direction in the will for management by rotation and not given by Court in the exercise of its discretion.

B. Sitarama Rao with *K. Venkateswaran* for Appellants.

K. Desikachari for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 202 of 1929.
30th August, 1932.

Civil Procedure Code (V of 1908), *O.* 21, *R.* 2—*Applicability of—Decree for partition—Judgment-debtor to execute and give a sale deed, failing which to pay Rs.* 2,000—*Plea that sale deed executed—If barred.*

A decree for partition provided among other things that the judgment-debtor should get a conveyance of some property executed in favour of the decree-holder by a third party in whose name the property stood and give the sale deed to the decree-holder, and on failure to so give within a time, the judgment-debtor was to pay Rs. 2,000. There was also a decree for money. The judgment-debtor pleaded that he had executed and given the sale deed to the decree-holder.

Held, that the plea was one of an adjustment of the decree and must be certified even according to 49 Mad. 716 as there was also a money decree.

93 I.C. 369 doubted.

N.R.C.

Obiter approved 1928 Cal. 715, in preference to the Madras view in 43 Mad. 476 and 49 Mad. 716 and held that O. 21, R. 2 would apply to any decree whether there is a direction to pay money or not.

B. Somayya and *Kasturi Seshagiri Rao* for Appellants.

S. Varadachariar, S. V. Venugopalachariar and *P. Chandra Reddi* for Respondent.

K.C.

Krishnan Pandalai, J. C. M. A. No. 434 of 1930.
31st August, 1932.

Provincial Insolvency Act, S. 17—*Debtor dying before adjudication—Subsequent adjudication of his "estate"—Proper form of —Official Receiver if can take proceedings under Ss.* 53 *and* 54 *for annulment of alienations.*

A debtor against whom a petition had been filed to be adjudicated an insolvent died before adjudication. The proceedings were continued under S. 17, Provincial Insolvency Act and the Court adjudicated 'his estate' insolvent. The Official Receiver applied to annul certain alienations as void under Ss. 53 and 54 of the Act. It was resisted on the ground that it was an alienation by the debtor, that it was *his estate* that was adjudicated and therefore the Receiver in estate's insolvency had no *locus standi.*

Held, that the proper order was to have adjudged the deceased debtor insolvent and not his estate, that what the Court did must be treated to be an inadvertent mistake and read according to law. When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17 of the Provincial Insolvency Act, the Official Receiver or the creditors can invoke the power of the Court to set aside alienations under Ss. 53 and 54. The change of language in S. 17 was not intended to limit by a side wind the powers of the Court in insolvency when the debtor dies after petition but before adjudication.

51 Mad. 344 and 51 Mad. 495 followed.

T. R. Venkatarama Sastriar and *P. R. Srinivasan* for Appellant.

R. Krishnaswami for Respondent.

S.V.V.

Reilly, J. C.R.P. No. 781 of 1929.
29th August, 1932.

Civil Procedure Code (*V of* 1908), *S.* 151—*Unstamped document produced by plaintiff—Court's direction to him to pay stamp duty and penalty—Plaintiff succeeding in his suit—Application by plaintiff for inclusion of the stamp duty and penalty paid by him in the costs allowed him by Court—Whether Court could grant him the application.*

The plaintiff sued, as adopted son, for recovery of moneys due to plaintiff's father from defendant and the defendant raised among other pleas the plea that the plaintiff was not adopted at all by his father. An issue having been raised on that point, the plaintiff produced an adoption Muri in evidence. It having been unstamped, plaintiff was asked to pay stamp duty as well as penalty before it could be received in evidence. Subsequently plaintiff succeeded in his suit. He applied for the inclusion of the said stamp duty and penalty paid by him in the costs allowed to him and the Lower Court granted the application.

Held, that the Lower Court could not entertain the application under S. 151 of the Civil Procedure Code and still less to make defendant pay the stamp duty and penalty on plaintiff's document.

K. G. Srinivasa Aiyar for Petitioner.

M. Patanjali Sastri and *A. Sundaram Aiyar* for Respondent.

K.C.

Jackson and Mockett, JJ. C. R. Ps. Nos. 1195 to 1229 of 1931.
30th August, 1932.

Court Fees Act—Suit by inamdar to eject tenant—Tenant pleading kudivaram right—Court-fee payable under S. 7, cl. 11 (*cc*) *or S. 7, cl.* 4 (*c*).

In a suit by an inamdar claiming that he was entitled to both the melvaram and kudivaram and entitled to eject the tenant on the land as a tenant-at-will, the tenant pleaded that the plaintiff was entitled only to melvaram and that himself was entitled to occupancy rights. The plaintiff paid Court-fee under S. 7, cl. 11 (*cc*) of the Court Fees Act but the Lower Court held that S. 7, cl. 5 applied to the case.

Held, neither cl. 5 nor cl. 11 (*cc*) applied to the case but only S. 7, cl. 4 (*c*). Clause 11 (*cc*) is applicable when the suit is based on a lease but not when plaintiff also wants a decree establishing his title. 27 M.L.J. 475. Clause 5 (*c*) would apply to a case where plaintiff is suing to be put into possession of an inam against a rival claimant or trespasser and it cannot be that a plaintiff should pay the same Court-fee when he sues for possession of an inam against a rival claimant, and when as undisputed inamdar he asserts his title to kudivaram alone.

N.R.C.

S. Varadachariar for *N. Rama Rao* for Petitioner.

The Government Pleader for Respondents.

S.V.V.

Venkatasubba Rao and Reilly, JJ. C.M.A. No. 138 of 1929.
5th September, 1932.

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 90—*Auction purchaser—Application by purchaser to set aside sale—If competent—Purchaser if a person whose interests are affected by the sale.*

In a suit on a mortgage, a decree for sale was passed as prayed for. In copying the schedule of properties into the decree, some items were by mistake omitted and the mistake continued into the sale proclamation. *A* bought the property in Court sale under the impression that the omitted items also were sold, but as he found they were not in fact included, he applied alternatively to issue a sale certificate with the omitted items also or to set aside the sale.

Held, that he could not be given a sale certificate with the omitted items but that his application under O. 21, R. 90 to set aside the sale was competent, as he was a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90.

38 M.L.J. 228 and 47 All. 479 followed.

S. Varadachariar and *S. V. Venugopalachariar* for Appellant.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* and *K. S. Desikan* for Respondents.

K.C.

Venkatasubba Rao and Reilly, JJ. C.M.A. Nos. 110 & 111 of 1929.
7th September, 1932.

Civil Procedure Code (*V of* 1908), *S.* 47—*Auction purchaser—If representative of judgment-debtor—Cl.* (1) *of S.* 47 *if mandatory—Court if bound to inquire a matter falling within cl.* (1)—*Relative scope of cl.* (1) *and cl.* (2) *of S.* 47, *Civil Procedure Code.*

Section 47, cl. (1) is mandatory and the Court has no discretion to refer the *parties* to a separate suit for the determination of a question which falls properly under the section. Section 47, cl. (2) applies only to cases where the proceedings do not properly come under cl. (1) but are initiated wrongly under S. 47 instead of by a separate suit.

An auction purchaser in execution of a money decree against the judgment-debtor is his representative and can come in under S. 47 to object to a sale of the properties purchased by him when they are sought to be sold as the property of the judgment-debtor in execution of a decree obtained by another decree-holder who had already attached the same, prior to the petitioner's purchase. His petition to release the attachment cannot come under O. 21, R. 58 as the attachment was proper when it was made.

An objection by the attaching decree-holder that the decree and auction sale of the later purchaser are collusive and sham and that the properties continue to belong to the judgment-debtor must be investigated by the Court under S. 47, cl. (1) and the Court has no power to stop the sale and refer the decree-holder to a separate suit to establish the fraudulent character of the purchase.

S. Panchapakesa Sastri and K. R. Krishnaswami Aiyar for Petitioners.

S. R. Muthuswami Aiyar for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 1126 of 1930.
7th September, 1932.

Lessor and lessee—Lease deed—Benami plea—If open to lessee—Absence of consideration for lease.

It was agreed between the plaintiff and the 2nd defendant that the plaintiff should lease certain lands to the 2nd defendant but at their request the 1st defendant executed a lease deed in favour of the plaintiff for the said lands to prevent the creditors of the 2nd defendant from attaching the crops thereon. In a suit by the plaintiff against the 1st defendant for rent on foot of the lease deed,

Held, (1) that it was open to the 1st defendant to plead and prove absence of consideration for the covenant to pay rent by showing that he was never given possession under the lease deed, that the lease deed was a benami transaction and that possession was intended to be and in fact was only with the 2nd defendant, and

(2) that the delivery of possession to the 2nd defendant would not amount to consideration for the 1st defendant's covenant to pay rent as it was not alleged that possession was given to 2nd defendant at the request of the 1st defendant.

20 M.L.J. 144 followed.

B. Sitarama Rao for Appellant.

K. Srinivasa Rao for Respondent.

S.V.V.

Madhavan Nair, J. C.M.S.A. No. 247 of 1927.
8th September, 1932.

Civil Procedure Code (V of 1908), *S.* 47—*Minor's next friend —Direction in an award decree that the next friend shall file accounts in the Subordinate Judge's Court—Default—Defendant's petition to Court to call on next friend to account—If maintainable—Appeal against—Petition, if falls under S. 47, Civil Procedure Code.*

A suit by a minor was referred to arbitration and the award was made a decree of Court. The decree expressly provided that

the next friend of the minor shall file accounts of his management of the minor's estate into the Subordinate Judge's Court only. On failure to so file the accounts the defendant moved the Subordinate Judge to call on the next friend to file the accounts, which was dismissed on the ground that the proper Court was the District Court in whom the jurisdiction was vested under the Guardian and Wards Act.

Held, that the next friend was in no sense "party" to the suit within the meaning of S 47, Civil Procedure Code, and the appeal was therefore incompetent.

30 All. 55 followed.

V. Ramaswami Aiyar for Appellant.

S. Varadachariar and S. V. Venugopalachariar for Respondent.

K.C.

Madhavan Nair, J. C.M.S.A. No. 225 of 1927.
8th September, 1932.

Limitation Act, Art. 182, *cl.* (5)—*Uncertified payment—No petition in time to record payment—Execution petition filed more than* 3 *years from last petition but within* 3 *years of payment—Mere payment if a step-in-aid of execution.*

Mere payment, without an application to record it, filed within 3 years of the prior execution petition, cannot serve as a step-in-aid of execution so as to save limitation under Art. 182, cl. (5) of the Limitation Act, 1908. To serve as step-in-aid, there must be some application before the Court and mere payment outside Court will not suffice.

20 L.W. 190 followed.

41 Mad. 251 distinguished as a case under S. 20 of the Limitation Act which only requires proof of payment and not a step-in-aid of execution

2 Rang 393 also distinguished as a case where there was an application before Court in time.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

S.V.V.

Jackson and Mockett, JJ. C.M.A No. 66 of 1930.
9th September, 1932.

Guardianship—Father—Second marriage—If disqualifies him from guardianship—Guardian and Wards Act, S. 19.

A father is not disqualified to be the guardian of his minor child by the first wife merely because he has married a second wife.

V. Govindarajachari for Appellant.

K. Kotayya with *S. Sitaraman* for Respondent.

S.V.V.

Bardswell, J. Cr. R. C. No. 203 of 1932.
6th September, 1932.

Criminal Procedure Code (V of 1898), *Ss.* 145 *and* 147—*Claim to do* pooja *as* poojari *of temples—Action under S.* 145—*Sustainability—Status of hereditary* poojari.

The claim to do *pooja* in certain temples as the hereditary *poojari* thereof can be the subject-matter of proceedings under S. 145, Criminal Procedure Code, and no separate consideration of the question is necessary under S. 147 of the Code Observations of Ayling, J., in 34 I.C. 651 relied on.

A hereditary *poojari* is also a servant of the temple trustee and his possession is for and on behalf of the latter. 35 Mad. 631 (F.B.) relied on.

A. V. Narayanaswami Aiyar for Petitioner.

K. S. Jayarama Aiyar and *K. G Srinivasa Aiyar* for Respondent.

The Public Prosecutor on behalf of the Crown.

B.V.V.

Jackson and Mockett, JJ C.M A. No. 376 of 1929.
9th September, 1932.

Civil Procedure Code (V of 1908)—*Minor—Guardian* ad litem —*Compromise by, in execution proceedings—Adjustment if requires sanction of the Court—O.* 21, *R.* 2 *and O.* 32, *R.* 7, *Civil Procedure Code.*

In view of the fact that 35 C L.J. 9, A I.R. 1926 Lah. 290 and A.I.R. 1927 Cal 930 are contrary to 29 Mad. 309 and as the authority of 29 Mad. 309 seems to be much shaken by 55 Mad. 17 (F.B.), their Lordships referred the question "whether 29 Mad. 309 is still good law that leave of the trial court is necessary for a minor's compromise after the decree and in execution" to a Full Bench.

K. V. Sesha Aiyangar for Appellant.

P. Vedachala Aiyar for Respondent.

S.V.V.

Madhavan Nair, J. C.C.C.A. No. 55 of 1930.
13th September, 1932.

Res judicata—*New information received after time for reviewing the prior decree passed—Subsequent suit, if barred—Suit by beneficial owner in possession—Section* 66, *Civil Procedure Code, if bars the plea of benami.*

Where a party relies on the same title in both the suits, merely saying that he has come across a new piece of information, would not entitle him to litigate a second time the validity of that title. New information is a ground for review under O. 47, Civil Pro-

N.R.C.

cedure Code and cannot be urged in a separate suit. Even if time for review has expired, S. 5 can be invoked in aid.

The question, how far a suit by a beneficial owner in possession for a declaration of his right to the property against a purchaser in Court-auction whose purchase is certified under S. 66 is maintainable, left open.

V. Visvanatha Sastri for Appellant.

S. B. Satya Nadar, E. R. Balakrishnan and *N. C. Rangasvami* for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 258 of 1930.
13th September, 1932.

Civil Procedure Code (*V of* 1908), *O* 21, *R.* 89—*"Received by decree-holder" in cl.* (b)—*Meaning of "received"—Moneys in deposit if "received" by decree-holder.*

In execution of a decree, certain properties were sold in lots under one proclamation, and amounts were deposited by purchasers under the earlier sales into Court. Another lot was later sold and the judgment-debtor deposited into Court the balance of the decree amount, the 5 per cent on the last lot's price and poundage. He claimed to be entitled to deduct the amounts in Court deposit. The prior sales were not confirmed by then.

Held, that "received by the decree-holder" means actual receipt and mere deposit in Court under the circumstances was not enough. The deposit of the balance was therefore not in accordance with R. 89.

S. V. Venugopalachari for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.C.

Jackson, Sundaram Chetty and Mockett, JJ. C. M. As. Nos 51 and 52 of 1929.
14th September, 1932.

Limitation Act (*IX of* 1908), *S* 15 *and Art.* 182—*Decree for sale—Suit by third party claiming properties as his and not the judgment-debtor's—Time taken by suit if can be deducted—Equitable considerations, if permissible—Prior application dismissed for non-payment of batta—Subsequent application, if can revive the old application.*

A final decree for sale of the mortgaged properties was passed in 1922 and six months after the decree, the decree-holder filed E. P. No. 57 of 1922 for sale of the properties but it was dismissed by Court on 16th January, 1923, expressly on the ground of non-payment of batta for sale. In 1919 one *M,* a third party, filed a suit impleading the decree-holder and mortgagors as party-defendants contending that the mortgaged properties belonged to a

mosque, were inalienable and therefore the decree in the mortgage suit was invalid. This suit was decreed by the Trial Court on 15th January, 1923. The mortgagee appealed and had it reversed in his favour on 6th August, 1927. About a month after that, on 23rd September, 1927, he filed a fresh execution petition in his mortgage suit for sale of the properties.

Held, the second execution petition was barred by limitation being more than three years from the dismissal of the first execution petition.

Though O. 9 and O. 17, Civil Procedure Code, do not apply to execution proceedings, still the Court has inherent power to dismiss an application for execution, when the applicant makes default in the payment of batta. The dismissal of E. P. No. 57 was proper and an application for execution which has been finally and properly dismissed cannot be revived. There should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed, in order to entitle the applicant to have the later application treated as one in continuation of or to revive the former one.

21 Mad. 257 and 95 I.C. 718 followed.

21 Mad. 261, 28 Mad. 250 and 27 All. 334 distinguished as cases where no final order was passed.

31 Mad. 71, 47 Mad. 176 distinguished as a case of wrong order.

The time taken in the appeal against the mosque decree cannot be deducted under S. 15. The words in S. 15 are "stayed" and not "inconvenienced". It cannot be said that the series of cases from 7 M.I.A. 238 to 43 Cal. 660 have superimposed upon the Limitation Act some equitable provision which finds no place in its sections. "Suppose in a similar case the mortgagor was possessed of much properties besides the mortgaged property. The decree-holder could put in his application for execution, sell the property with the blot on the title for what it is worth or have it recorded that the property was legally extinct (*see* 50 Cal. 710) and then apply for a personal decree; and to say that in these circumstances execution has been stayed is to wrest the expression entirely away from its ordinary meaning."

76 I.C. 557 and 82 I.C. 1 followed.

50 Mad. 417 approved.

53 M.L.J. 520 not followed.

43 Mad. 185 discussed and distinguished.

5 Pat.L.J. 39, 47 I.C. 907, 23 Cal. 775 and 12 M.I.A. 244 distinguished.

Per Mockett, J.—For the application of S. 15 of the Limitation Act, the injunction or order must be express in its terms and

cannot be implied. There is no room for equitable considerations in construing the Limitation Act.

53 M.L.J. 329 relied on.

N. Sivaramakrishna Aiyar for Appellant.

Ch. Raghava Rao, A. Sundaram Aiyar and *V. Krishna Mohan* for Respondent.

S.V.V.

Bardswell, J. C. M. Ps. Nos. 4040 and 4335 of 1932
15th September, 1932.

Writ of certiorari—Election dispute—Madras District Municipalities Act—Scope of election petition enquiry—Erroneous decision of election officer—Decision on an objection not taken before him—Illegal—Certiorari, scope of.

The Subordinate Judge of Vellore hearing objections on election petitions under District Municipalities Act is a *persona designata*. A disqualification under S. 49 of the Act can be made a ground for a petition before the election officer impugning the election. The officer has got jurisdiction to hear and decide objections raised under the section and the High Court will not interfere by writ of certiorari, merely because his interpretation of S. 49 is erroneous.

62 M.L.J. 644 and 52 Mad. 732 followed.

None of the cases, 4 A.C. 30, (1924) 1 K.B. 171, (1910) 2 K.B. 165, (1922) 2 A.C. 128, 5 P.C 417, (1926) 2 K.B. 192 or (1930) 2 K.B 215 is an authority for the position that an erroneous decision on a point of law, by a Court acting within the limits of its jurisdiction can be quashed by a writ of certiorari.

But when a Court or similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of the law, a writ will be issued. As the election officer has no jurisdiction to decide except on the objections raised before him, an order based on an objection not taken before him is illegal and will be quashed by certiorari.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *D. Krishnaswami* for Petitioner in C. M. P. No. 4040 of 1932.

S. Srinivasa Aiyangar, S. Parthasarathi and *V. K. Tiruvenkatachari* for Petitioner in C. M. P. No. 4335 of 1932.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Respondents in both.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 480 of 1929.
16th September, 1932.

Res judicata—*Principle of—If applicable to insolvency proceedings.*

Though S. 11, Civil Procedure Code may not in terms apply, the principle underlying the rule of *res judicata* applies also to insolvency proceedings.

11 A.C. 37, 48 Cal. 499 and 45 Mad. 320 followed.

T. R. Ramachandra Aiyar for *G. Musalappa Reddy* for Appellant.

S. Ranganadha Aiyar and *T. R. Arunachalam* for Respondent.

S.V.V.

Jackson and Mockett, JJ. C. M. A. No. 217 of 1930.
16th September, 1932.

Civil Procedure Code (V of 1908), *S.* 47 *and O.* 20, *R.* 9—*Compromise decree—Decree for immovable property—Properties not specified by boundaries, etc.—If O.* 20, *R.* 9 *avoids the compromise.*

In a suit between a brother and sister, the sister suing for her share in patrimony, a compromise decree was passed under which the sister was to get 160 acres, the lands to be selected by her as she pleased. She indicated the lands and the brother gave them to her, but whether he actually gave over possession of them or not was not clear. The brother became an insolvent and in execution the sister called on the Official Receiver in his insolvency to give her a document specifying the lands.

Held, that the case fell under S. 47 and no suit would lie. Therefore the question must be decided by the Court executing the decree.

Order 20, Rule 9, Civil Procedure Code, does not apply to the case as it is only a precept for Courts in drawing up decrees in suits for immovable property. But the rule does not necessarily avoid the terms of a decree based upon a compromise and the decree is therefore executable.

V. Govindarajachari for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Madhavan Nair, J. C. M. S. A. No. 234 of 1927.
19th September, 1932.

Limitation Act (IX of 1908), *S.* 19 (2)—*Insolvency of judgment-debtor—Schedule containing acknowledgment—Date being stroked out—Evidence as to date of acknowledgment—Admissibility.*

Where the judgment-debtor became insolvent and the schedule of assets and liabilities filed by him contained an acknowledgment of liability as regards the suit claim but the schedule contained a date that had been stroked out, which if taken into account would bar the later execution application,

Held, that for purposes of S. 19 (2) of the Limitation Act the writing containing the acknowledgment should be taken to be undated and evidence may be given as to its correct date.

26 Bom. 128 disapproved.

K. V. Venkatasubramania Aiyar for Appellant.

E. Vinayaka Rao for Respondent.

B.V.V.

Sundaram Chetty, J. S. A. No. 484 of 1929.
20th September, 1932.

Religious office—Archaka murai *in temple—Alienation for pecuniary advantage of holder—Custom permitting transfer—Validity.*

A transfer of a religious office, such as an archaka *murai* in a temple, made for the pecuniary advantage of the holder is invalid even if sanctioned by the usage of the institution. A religious office and its emoluments are *extra commerciam* and cannot be permitted to be dealt with as private property.

1 Mad. 235 (P.C.) relied on.

Dictum of Sadasiva Aiyar, J. in 38 Mad. 850 approved.

42 Cal. 455 not followed.

T. M. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

S.V.V.

Ramesam and Pakenham Walsh, JJ.
16th September, 1932.

C. M. Ps. Nos. 6459 of 1931, 5155 of 1930, 2310 of 1931 and 2074 of 1932.

Writ of Certiorari—Jurisdiction to issue—Distinction between "administrative" and "judicial" acts—Proceedings of Revenue Board under Chap. XI, Madras Estates Land Act, 1908*—If can be quashed by High Court—Appeal under S.* 171*—Absence of notice to respondent—If legal—Pannai lands—If come under the Act—S.* 172*—Board if can revise or direct revision.*

The High Court has power to issue a writ of certiorari to quash the proceedings of the Revenue Board under such provisions of Chap. XI as are to be exercised "judicially" and not "ministerially or administratively". A tribunal may not be a Civil Court but yet may act "judicially". An executive body may discharge judicial functions also and an executive act may also partake of a judicial character. The Full Bench in 63 M. L. J. 450 was only considering whether the Revenue Board was a Civil Court and not the further question whether they were in any sense a judicial tribunal in the sense required for issuing a writ of certiorari. Though the main purpose of the functions of a revenue officer is to carry out an executive act, viz., the preparation of the record-of-rights including settlement of rent, parts of his duties are undoubtedly of a judicial character and to this extent those functions partake of the character of acts of a judicial tribunal. (1906) 2 K. B. 501. A settlement of rent between landlord and tenant cannot be said to be purely ministerial. (1911) A. C. 179. The mere fact that the tribunal can rely on its experience cannot make the act any the less a judicial one.

(1924) 1 K. B. 171, (1926) A. C. 586 and (1929) 1 K. B. 619 relied on.

(1931) A. C. 275, 53 Mad. 979, 55 Mad. 107 and 60 M. L. J. 260 distinguished.

Unless the Court is satisfied that irregularity of procedure has led to some substantial injury, the writ will not be issued.

In respect of the issue of notice and hearing parties the language of S. 171 of the Estates Land Act is in marked contrast to that of Ss. 169, 170 and 172 and therefore the Board's acts under S. 171 without notice to the party affected by it (respondent where appeal is allowed) is not *ultra vires,* though it is proper and desirable to hear the party to be so adversely affected.

All pannai lands are excluded from the Estates Land Act and no record-of-rights can be made with regard to them. The question whether a land is pannai or not must be decided before the

N. R. C.

record is made and cannot be left open. Failure to enquire into it is a failure to exercise jurisdiction and a writ can, therefore, be issued.

Per Ramesam, J.—The words 'Direct the revision' in S. 172 cannot enable the Board itself to proceed to revise the record. It can only mean that it should direct the revision by some other officer and that other officer can only be the Revenue Officer who made the original settlement and not the confirming authority under S. 170 or the Superior Revenue Authority under S. 169.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Petitioner in C. M. P. No. 6459 of 1931.

B. Jagannadha Doss, reporting no instructions, for Respondents in C. M. P. No. 6459 of 1931.

S. Varadachariar and *A. Swaminatha Aiyar* for Petitioner in C. M. P. No. 5155 of 1930 and Respondent in C. M. Ps Nos. 2310 of 1931 and 2074 of 1932.

Watrap S. Subrahmania Aiyar for Petitioner in C. M. P. No. 2074 of 1932 and Respondents in C. M. P. No. 5155 of 1930.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Petitioner in C. M. P. No. 5155 of 1930.

P. Venkataramana Rao (Government Pleader) for the Revenue Board in all cases.

S. V. V.

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Jackson and Mockett, JJ. L. P. A. No. 29 of 1927.
20th September, 1932.

Hindu Law—Joint family—Coparcener alienating his share—Alienating coparcener's death—Subsequent suit by the surviving coparcener for partition—Alienee's position—If entitled to the share of the properties as it existed at the time of alienation or at the date of suit.

Two brothers constituted a joint Hindu family and one of them alone alienated a parcel of family land and put the alienee in possession of it. The rest of the family property was dissipated and then the non-alienating brother sued for partition and possession of his half share in the land. At the time of the alienation, this was less than alienor's half share and it was contended that the alienee was entitled to his alienor's share as it stood at the date of the alienation and that therefore the suit must fail. It was held by Devadoss, J., in Second Appeal following 35 Mad. 47 and 46 Mad. 815 that the alienee cannot be disturbed.

Held, reversing Devadoss, J., that on principle the alienee literally buys only the right that his vendor has and that is his right

of partition subject to the contingency of fluctuation in a joint Hindu family by births, deaths, etc. An exception has been recognised in the case where the alienor dies and then the alienee though logically should get nothing, is given the share as at the date of the alienation. 35 Mad. 47. But that cannot be extended further. It only laid down that the quantum or fraction of the share is to be computed as at the date of the alienation. But as regards the properties to be partitioned, the alienee is entitled to take the family property as on the date of the suit for partition and the Courts cannot embark on an enquiry as to the properties at the date of the alienation. This is more equitable as the alienee has only to thank himself if, by delaying his right to partition, he finds his security diminished.

14 Mad. 408 (F. B.) and 38 Mad. 684 followed.

35 Mad. 47 and 46 Mad. 815 doubted and distinguished.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

T. M. Ramaswami Aiyar for Respondent.

S. V. V.

Krishnan Pandalai, J. C. M. A. No. 375 of 1932.
21st September, 1932.

Receiver—Mortgage suit—Simple mortgage—Personal remedy expressly given up—Receiver, if can be appointed.

Where in a suit upon a simple mortgage, the mortgagee expressly gave up his personal remedy,

Held, no receiver could be appointed either on the ground that security is diminishing in value on account of fall in the market or that the mortgagor does not pay interest or for any other such reason. In such a case the security extends merely to the corpus and not to its future income. Unless the personal remedy is subsisting, to appoint a receiver will be to enlarge the mortgagee's security or enlarge his rights to the prejudice of third parties who have acquired rights in equity of redemption.

29 M. L. J. 457, 14 C. L J. 526 and 1925 M. W. N. 802 followed.

100 I. C. 735 not followed.

13 C. L. J. 495, 17 I. C. 202, 52 Mad. 979 and 1929 Mad. 184 distinguished.

54 Mad. 565 doubted in so far as it gives a preferential right to the mortgagee.

Leave to appeal granted.

K. S. Ramabhadra Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

S. V. V.

Sundaram Chetty, J. S. A. No. 3 of 1930.
27th September, 1932.

Civil Procedure Code (*V of* 1908) *—Practice—Suit against* A *and* B *for alternate relief—Suit decreed against* A *but dismissed against* B*—Appeal by* A—B *not impleaded—Plaintiff if can apply to add* B *as a respondent—O.* 41, *Rr.* 20, 33 *and O.* 1, *R.* 10, *Civil Procedure Code.*

A suit was brought against *A* and *B* for relief against *A* or *B*. The suit was decreed against *A* but dismissed as against *B*. *A* alone appealed impleading only the plaintiff as respondent and omitting to implead *B*. Before the hearing of the appeal but after service of notice on the plaintiff, he applied to add *B* as a party respondent, so that if on appeal *A* be exonerated, he may have his claim against *B* adjudicated on.

Held, that *B* can be added as a party. No question of limitation can arise as the plaintiff could not have appealed against *B* so long as the decree against *A* was subsisting. The words "interested in the result of the appeal" in O. 41, R. 20 mean interested in the result of the appeal including memo. of objections, etc., 11 L. W. 602; and as a memo. of objections could have been filed against *B*, the Court could act under R. 33 even in the absence of a memo. of objections.

Even if O. 41, R. 20 did not cover the case, the addition could be made under O. 1, R. 10 read with S. 107.

58 Cal. 923 not followed as contrary to 11 L. W. 602.

6 Rang. 29 (P. C.) and 9 Rang. 624 distinguished as cases where the plaintiff was the appellant and the party sought to be added who was a necessary party could have been impleaded in the appeal in the first instance.

82 I. C. 600 followed.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. S. Rajagopalachari* for Appellant.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Plaintiff-respondent.

A. V. Narayanaswami Aiyar for Party-respondent

S. V. V.

Mockett, J.
27th September, 1932.

C. R. P. No. 1383 of 1929.

Evidence Act (I of 1872), *S.* 32 (2)—"*Books kept in the ordinary course of business*"—*Meaning of—Case of "no evidence"—If interference under S.* 115, *Civil Procedure Code, possible.*

The principle underlying the exception in S. 32, cl. (2) to the rule that hearsay evidence is inadmissible is that what a man writes down as a necessary incident of daily or regular business routine is likely to represent the facts and it will be dangerous to extend it to a case where there was no business transacted by the deceased man but a book was maintained by him with casual entries representing his private affairs. For the application of the section there must be (1) some business or habitual engagement in which the deceased was occupied, (2) the book should be kept for that purpose, and (3) the entry should be made in the book according to the usual routine.

23 Bom. 63 followed. Where the Court decides relying on inadmissible evidence and omitting that, there is no evidence to support the judgment, the case is one of material irregularity under S. 115, Civil Procedure Code.

9 All. 398 followed.

S. Jagadisa Aiyar and *S. Nagaraja Aiyar* for Petitioner.

M. S. Venkatarama Aiyar for Respondents.

S. V. V.

The Chief Justice, Ramesam, Sundaram Chetty, Pakenham Walsh and Burn, JJ.
28th September, 1932.

O. P. No. 243 of 1931.

Income-tax—Mutual Benefit Societies—Income earned by—If profits assessable to tax—Payment of guaranteed interest to subscribers—If an allowable deduction.

The Madura Permanent Fund returned an income of Rs. 14,000 and odd as liable to tax claiming a deduction of Rs. 68,000 odd as interest paid on borrowed capital relying on I. L. R 47 M. 1. On a case being stated,

Held, that this fund and similar funds are not companies but really mutual societies dependent upon the subscribed capital of their members. The capital of the funds though called share capital is not really so. In questions arising under the Income-tax Acts, the registration under the Companies Act is not conclusive. The capital which is fluctuating from time to time is more in the

nature of a loan by the subscribers to the Fund. If this is regarded as share capital, it will mean that the sanction of the Court should be obtained for each subscriber being re-paid and that will render the Funds unworkable. The subscriber may be entitled to sue the Fund like any other lender advancing money to a partnership in respect of the capital. S. 10 (2), (3) shows that the legislature intended to regard guaranteed interest as interest payable on borrowed capital and the deduction was therefore allowable.

14 A. C. 381 (*Style's case*) distinguished as a case of a division of surplus arising by over-estimate.

47 Mad. 1 and 3 I. T. C. 385 referred to and discussed.

S. Srinivasa Aiyangar, K. Rajah Aiyar, V. Ramaswami Aiyar, K. S. Rajagopalachari and *S. Venkatachallam Aiyar* of Madura Bar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

S. V. V.

Madhavan Nair, J. C. M S. A. No. 217 of 1927.
28th September, 1932.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage—Application to set aside—Filed more than three months from execution but within three months of registration—S. 54 applied—S. 53 if applies where mortgage in favour of a creditor.

A mortgage was executed on 9th March, 1922, but was registered only on 9th June, 1922. The insolvency court having jurisdiction over the mortgaged properties closed on 9th May, 1922 and re-opened on 10th July, 1922. On a petition presented on 10th July, 1922, the debtor was adjudicated an insolvent, the act of insolvency alleged being this mortgage itself. The Official Receiver applied under Ss. 53 and 54 of the Provincial Insolvency Act for setting aside the mortgage. On a contention being raised that the mortgage being more than three months prior to the date of adjudication, S. 54 did not apply.

Held, that by virtue of S. 59, Transfer of Property Act, the mortgage becomes a valid mortgage only on registration; that therefore for S. 54 of the Provincial Insolvency Act the date of registration is the crucial date.

Held, further, that though the mortgage was in favour of a creditor, it can also be questioned under S. 53.

K. V. Krishnaswami Aiyar for Appellant.

R. Krishnaswami for Respondent.

S. V. V.

Madhavan Nair, J. C. M. S. A. No. 91 of 1928.
3rd October, 1932.

Provincial Insolvency Act (V of 1920), *Ss.* 43 *and* 37.(2)—*Insolvent not applying for discharge in time—Subsequently devolved properties—Official Receiver, if can sell—Annulment of adjudication, if automatic on expiry of time for discharge.*

An insolvent did not apply for discharge within the time fixed by the Court for the purpose, nor was any application made to the Court for extension of the time. Subsequently some properties devolved on the insolvent after the time for discharge had expired. The Official Receiver proceeded to sell them. On its being contended that the Official Receiver had no power to sell them,

Held, that S. 43 states that the adjudication "shall be" annulled and not that it " shall stand " annulled. This, as also the language of S. 37 (2), clearly indicates that there should be an order of Court formally annulling the adjudication. In the absence of an order to that effect, the insolvent continues to be undischarged and the Official Receiver's right to sell the properties continues.

53 Mad. 288 (F. B.) and 52 Mad. 648 relied on.

R. Gopalaswami Aiyangar for Appellant.

K. S. Desikan for Respondent.

S. V. V.

Venkatasubba Rao and Reilly, JJ. C. M. A. No. 226 of 1932.
3rd October, 1932.

Provincial Insolvency Act (V of 1920), *S.* 52—*Order under—Whether appealable—Section whether applies to cases where there is no attachment of property in execution of decree.*

No appeal lies against an order passed under S. 52 of the Provincial Insolvency Act by an Interim Receiver.

S. 52 of the Provincial Insolvency Act has no application to a case where the property is not attached in execution of a decree; it has only application to cases where the property is held in *custodia legis* by attachment or otherwise.

55 Mad. 316 distinguished.

T. R. Venkatarama Sastri and *K. P. Mahadeva Aiyar* for Appellant.

C. A. Seshagiri Sastri and *K. S. Desikan* for Respondent.

K. C.

Madhavan Nair, J. C. R. P. No. 365 of 1932.
4th October, 1932.

Court Fees Act (VII of 1870 *as amended by Madras Act V of* 1922), *S. 7 iv-A and v—Suit for cancellation of sale deed and for possession—Court-fee payable.*

The plaintiff sued for the cancellation of a sale deed executed by her and for recovery of possession of land with mesne profits. The plaintiff paid court-fee for the cancellation of the sale deed on the amount of the consideration mentioned in the sale deed and also paid court-fee on the mesne profits.

Held, that the claim with respect to possession was only ancillary to the main claim, namely, setting aside the sale deed and that separate court-fee need not be paid in respect of the claim for possession of the property.

49 M. L. J 608 and 36 L. W. 225 referred to.

K. S. Desikan for Petitioner.

K. S. Champakesa Aiyangar for Respondent.

B. V. V.

Jackson and Pakenham Walsh, JJ. L. P. A. No. 46 of 1927.
4th October, 1932.

Custom—Hindu inhabitants of village—Right to perform ceremonies and go round peepul tree—Acquisition by custom—Finding as to custom—Interference in second appeal—Civil Procedure Code, 1908, *S.* 100.

The right to perform certain ceremonies at the foot of a peepul tree and to perform *pradakshanam* round the tree can be acquired by the Hindu residents of a village by force of custom. The inhabitants of the village are sufficiently definite for that purpose and the fact that other persons with or without right claim the same privilege by force of custom is immaterial.

61 I. C. 132 relied on.

The existence of a custom or usage having the force of law is a mixed question of fact and law. S. 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the finding arrived at by the Lower Court of actual facts from which the existence of the custom has been inferred.

41 Mad. 374 followed.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for Appellant.

K. Kuttikrishna Menon and *P. A. Krishnakutti Nair* for Respondents.

B. V. V.

Krishnan Pandalai, J. C. M. A. No. 160 of 1932.
4th October, 1932.

Civil Procedure Code (V of 1908), *O.* 23, *R.* 1—*Prior suit against brother for a declaration of joint status—Death of defendant brother pending suit—Withdrawal of suit—Subsequent suit against brother's widow for possession as sole surviving coparcener —If barred.*

One of two coparceners sued the other for a declaration that they were members of a joint family and that certain properties claimed by the defendant as his own belonged to the joint family. The plaint did not, however, seek partition. The defendant having died pending the suit, the plaintiff withdrew that suit without bringing the defendant's widow on record as his legal representative. The present suit was filed by the same plaintiff against the widow of the deceased claiming to recover possession of the whole property as sole surviving member of the joint family.

Held, that the second suit was not barred under O. 23, R. 1, Civil Procedure Code, by reason of the withdrawal of the former suit, as the second suit was not based on the same cause of action as the first.

39 Mad. 987 (F. B) referred to and followed.

The mere fact that even in the former suit the plaintiff might, on the defendant's death, have applied to amend his plaint and claimed possession of the whole property would not conclude the present question.

Case-law discussed.

T. R. Venkatarama Sastriar and *C. A. Seshagiri Sastri* for Appellants.

S. Varadachariar and *A. Parameswaran* for Respondent.

S. V. V.

Sundaram Chetty, J. S. As. Nos. 3 and 1082 of 1930.
11th October, 1932.

Mahomedan co-heirs—One co-heir transferring property (mortgage debt) on behalf of another minor co-heir as guardian—Validity of—Suit on mortgage by transferee—Sale thereon—Purchase by a stranger—Mother guardian of minor to suit also—Mother ex parte—*Gross negligence—Decree not binding—Suit by minor to recover his share—Purchaser in Court sale not liable—Transferee or mortgagee liable—Prior suit if* res judicata.

On the death of a Mahomedan, his widow and minor daughter succeeded to his property as co-heirs Amongst the properties so inherited was a mortgage debt which the widow acting for herself and as guardian of her minor daughter assigned to *A* who in turn assigned the same to *B*. *B* sued to enforce the mortgage making the mother and the minor daughter party defendants to that suit,

N. R. C.

the mother herself being nominated guardian *ad litem* of her minor daughter. The mother did not appear at the trial to claim that the alienation of the minor's interest was void under the Mahomedan Law and the Court holding that *B* was entitled to enforce the mortgage gave him a decree for sale. The mortgaged properties were purchased in the Court sale by a third party The minor daughter after attaining majority sued to recover her share of the mortgage debt either by sale of the hypotheca or from *B*.

Held, that the assignment of the daughter's interest in the mortgage by the mother was void in law; but as it cannot be said that the daughter was not at all represented in *B's* suit, the Court had jurisdiction to direct the sale of the mortgaged property for the whole debt and a third party purchaser was not bound to go behind the Court's decree and enquire whether or not the daughter's interest passed to *B* or whether the mother could have been appointed as guardian *ad litem* or conducted the defence properly on behalf of the minor. The daughter had therefore no right to proceed against the hypothecated property in the hands of the purchaser.

Held, further, that the daughter could claim to recover from *B* her share of the amount realised by him under the decree in his suit. *B* was really in the position of a co-owner as the mother's share had vested in him and the case therefore fell under S. 90 of the Trust Act. An action for money had and received would also lie on the ground that a person who had realised moneys under a void assignment was in equity bound to refund the amount to the assignor.

30 Mad. 459 followed.

41 Mad. 923 distinguished on the ground that in that case the assignee from one partner purchased the whole debt in the belief that his assignor was exclusively entitled to the whole debt and he could not therefore be held to stand in a relationship of co-owner or other privity known to law towards the partners of his assignor, whereas in the present case the assignment expressly purported to be of the respective rights of the mother and the daughter.

Held also that the decision in *B's* mortgage suit would not bar the daughter from pleading that the assignment of her share was not binding on her. Though the mother as guardian *ad litem* could have raised this plea in that suit, she was guilty of gross negligence in not doing so and hence the minor could not be barred.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Appellant.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Respondent.

A. V. Narayanaswami Aiyar for Party Respondent (added as per order noted in 63 M. L. J. (N. R. C.) p. 30).

S. V. V.

Jackson and Mockett, JJ. C. M. A. No. 122 of 1930.
12th October, 1932.

Restitution—Court's powers to—S. 151 *if can be invoked apart from S.* 144, *Civil Procedure Code.*

The appellant bought certain property at a revenue sale on 20th June, 1918 The sale was cancelled and thereon a suit was filed to declare the cancellation to be erroneous. There was a prior mortgage over the property which had merged into a decree in 1913. In execution of the mortgage decree the property was purchased by the respondent in 1921. When he applied for delivery, he was obstructed by the appellant. The Court passed somewhat the following order thereon:—" It is no doubt true that the counter-petitioner filed a suit in the District Munsif's Court for vacation of the order (cancelling his revenue sale) but until and unless it is so vacated, he is not entitled to resist delivery of the item. The decision in that suit will be binding upon the petitioner also since he is impleaded as a defendant therein. His objection is disallowed." In the suit the appellant succeeded and claimed back possession by way of restitution.

Held, the appellant has acquired a title independent of the respondent's mortgage. The order on the petition is final under O 21, R. 103, but the order itself is only that pending the suit, delivery must be given subject to the result of the suit. Since the Court itself deprived him of possession, it should itself put him back. Apart from S. 144, Civil Procedure Code, " if a Court has done obvious injustice, it will pay back to justice what it owes " under S. 151, Civil Procedure Code.

V. Viyyanna for Appellant.

S. Kanakam for Respondent.

S. V. V.

Sundaram Chetty, J. S. A. No. 192 of 1931.
12th October, 1932.

Damages—Suit for damages owing to wrongful execution of decree in a previous suit between same parties—Agreement between parties in the previous suit that the decree-holder should not execute his decree until a certain promissory note in judgment debtor's favour had been sued upon and satisfaction towards decree obtained —Promissory note endorsed over to decree-holder—Decree-holder allowing the promissory note to become time-barred—Subsequent execution by decree-holder—Whether judgment-debtor can sue for damages for loss by breach of agreement.

Plaintiff brought a suit for recovery of damages for wrongful execution of a satisfied decree by the defendants against him. In

a previous suit filed by defendants against the present plaintiff an agreement was entered into between the parties whereby it was agreed that a certain promissory note executed in favour of plaintiff by a third person should be endorsed over to the defendants and that until the defendants had filed a suit and obtained a decree on that note for satisfaction of the amount due to them from the plaintiff, they should not execute the decree obtained by them in the suit against plaintiff. The said promissory note was not sued upon before it became time-barred nor was it endorsed over to plaintiff before it had become time-barred so as to enable him to file a suit himself and obtain a decree on it, though he intimated to the plaintiff earlier that he would not sue on the note but that the plaintiff must make arrangements to sue.

Held, that the plaintiff was certainly entitled to recover damages from defendants by showing that he really sustained loss by reason of the promissory note having been allowed to become time-barred.

108 E. R. 489 not applied.

32 Cal. 27 (P. C.) distinguished.

The proper issue for determining the question of damages is whether by reason of the breach of the agreement by the defendants not filing the suit on the pronote and allowing the pronote while in their custody to become time-barred the plaintiff has sustained any and what damage and what is the proper and reasonable amount of damages available to him.

S. Varadachariar and *A. C. Sampath Aiyangar* for Appellants.

B. Sitarama Rao and *N. Gopala Menon* for Respondents.

K. C.

Burn, J. C. M. P. No. 4004 of 1932.
18th October, 1932.

Writ of Prohibition—Registrar of Co-operative Societies—Legal advisor and director of Urban Bank—Account of business done by him in Court—If an officer of the bank in respect of such business.

The Deputy Registrar called on the petitioner to account to him in respect of sums received from the Urban Bank and spent by him on Court business done by him for the bank between 1919 and 1932. The petitioner was a legal advisor of the bank and as such an ex-officio member of the Board of Directors of the bank.

Held, that he was an officer of the bank within the meaning of S. 2 (*d*) of the Co-operative Societies Act, 1912, and this being a dispute between the petitioner and the Society, it is one which falls to be decided by the Registrar under S. 43, cl. (*l*) of the Act and R. 41-A of the rules made thereunder. The fact that his position as legal advisor gives him under the rules a seat on the Board of Directors makes all the difference between this case and the English cases of Solicitors and Co-operative Societies.

T. R. Venkatarama Sastriar and *P. S. Narayanaswami Aiyar* for Petitioner.

P. Govinda Menon for Respondent.

S. V. V.

Bardswell, J. C. M. Ps. Nos. 3428 and 4876 of 1932.
19th October, 1932.

Injunction—High Court in the exercise of appellate or revisional jurisdiction over Subordinate Courts in moffussil—If can issue an injunction apart from Civil Procedure Code.

In a case coming before the High Court on appeal or revision from the decision of a Subordinate Court in the moffussil, the High Court can only apply such law or equity and rule of good conscience as would be applied by that moffussil Court. It can therefore only grant an injunction in respect of such a case only in accordance with the provisions of O. 39, Civil Procedure Code.

23 L. W. 85; 26 L. W. 899 and C. M. P. No. 3349 of 1932 followed.

35 L. W. 168 and 33 Bom. 469 discussed and not followed.

Case-law discussed.

K. S. Champakesa Aiyangar for Petitioner.

Watrap S. Subramania Aiyar for Respondent.

S. V. V.

N R C

Bardswell, J. C. M. P. No. 1431 of 1932, etc.
19th October, 1932.

Appellate Side Rules—Ad interim *injunction—Injunction absolute after notice to the respondent—If a fresh injunction and fresh fee to be paid.*

What is generally termed an interim injunction, or an injunction *ad interim,* is strictly speaking, not an injunction at all but only an order of an injunctional character and of its very nature limited to the period within which it is directed that it shall be in force. The injunction ordered after notice will be the injunction as contemplated by O. 39, R. 3, and for its being issued, the fee has to be paid.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Petitioner in C. M. P. No. 1431 of 1932.

The Government Pleader and *N. Rama Rao* for Respondents in C. M. P. No. 1431 of 1932.

S. V. V.

Pakenham Walsh and Bardswell, JJ. L. P. A. No. 70 of 1932.
21st October, 1932.

Civil Procedure Code (V of 1908), *O.* 44—*Appeal in* forma pauperis—*Meaning of proviso to R.* 1 *of O.* 44, *Civil Procedure Code—"Contrary to law"—If mere perusal thereof should show it to be contrary to law—Notice to respondent, if necessary.*

Held, (reversing Burn, J.) that under the proviso to O. 44, R. 1, it is enough if there is an arguable point of law for leave being granted. No notice need go to the respondent for this stage.

53 Mad. 245 followed.

The Advocate-General (Sir A. Krishnaswami Aiyar) with *Ch. Raghava Rao* for Appellant.

S. V. V.

Sundaram Chetty, J. Application No. 2776 of 1932 in
30th September, 1932. C. S. No. 283 of 1931.

Mortgage suit—Claim calculated up to date of plaint—Plaint filed long after—Passing of preliminary and final decree—Payment to decree-holder from sale proceeds—Subsequent discovery of mistake regarding the amount due—Application by decree-holder for amendment of the decree—Maintainability—Civil Procedure Code, 1908, *S.* 152.

The plaintiff sued on a mortgage and the claim for principal and interest was calculated up to the date of the signing of the plaint. The plaint was actually presented two months thereafter and a preliminary decree was passed calculating the amount due from the date of presentation of the plaint. Subsequently a final decree was passed, mortgaged property sold and from the sale proceeds the amount shown in the preliminary decree was paid to the decree-holder. Subsequently the decree-holder discovered that the claim for interest between the date of the signing of the plaint and the date of the presentation had been left out in the preliminary decree and applied for an amendment of the decree so as to include the same.

Held, that the Court has inherent jurisdiction to order an amendment in a case of this kind,

25 L. W. 102; A. I. R. 1924 Rang. 104; 61 M. L. J. 805 and 62 M. L. J. 350 referred to.

K. S. Rajagopala Aiyangar for Decree-holder.

V. Sivaprakasa Mudaliar for Judgment-debtor.

T. N. C. Srinivasavaradachari for subsequent mortgagee.

K. C.

Krishnan Pandalai, J. C. M. As. Nos. 69 and 70 of 1929
19th October, 1932. and
C. R. Ps. Nos. 791, 792 and 1282 of 1929.

Civil Procedure Code (V of 1908)*—Partition suit—Right of plaintiff to withdraw suit—If defendants entitled to object to withdrawal or claim transposition—S.* 146, *O.* 22, *R.* 10 *and O.* 1, *R.* 10, *Civil Procedure Code.*

After filing a partition suit against three other branches who were admittedly the plaintiff's coparceners, the plaintiff mortgaged his share and thereafter applied to withdraw his suit, by reason, it was said, of a secret arrangement between himself and some of the defendants. At this stage two applications were made, one by the plaintiff's mortgagee to be impleaded as a plaintiff and to be allowed to continue the suit and another by the Official Receiver in the insolvency of one of the defendants to be transposed as plaintiff if necessary and to be allowed to continue the suit.

N. R. C.

Held, that the mortgagee cannot claim the benefit either of O. 22, R. 10, Civil Procedure Code, which contemplates a transferee only of an absolute interest, 1 Pat. 581 followed.

Nor can he invoke S 146, Civil Procedure Code, which is a residuary section intended to apply to proceedings other than suits.

41 Mad. 510 doubted.

44 Mad. 919 explained and distinguished.

Under the Civil Procedure Code the procedure by way of counter-claim does not obtain in this country and the rule laid down in 11 Q. B. D. 464 at 468 which is based on the English practice cannot accordingly be followed in this country to the extent of depriving a plaintiff of his power of putting an end to the suit by withdrawal, merely because if the suit had gone on the defendant might have also had his share separately decreed to him. A partition suit is no exception though by reason of anything that may happen in the course of the suit, such as a compromise or a preliminary decree or a partial partition, the defendant may acquire rights which he may be entitled to work out notwithstanding plaintiff's withdrawal,

7 Bom. 167 and 20 C. W. N. 752 explained as arising from the Original Side of the High Court where the counter-claim procedure is recognised.

1914 M. W. N. 155; 12 L. W. 563 and 49 Bom. 672 explained.

Case-law discussed.

S. Varadachariar and *C. A. Seshagiri Sastri* for Petitioner in C. R. Ps. Nos. 791 and 792 of 1929.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *T. D. Srinivasachariar* for Appellant in C. M. As. Nos. 69 and 70 of 1929.

S. Srinivasa Aiyangar, T. M. Krishnaswami Aiyar and *K. S. Venkataraman* for contesting respondent in both.

V. Rajagopala Aiyar and *T. V. Ramiah* for Petitioner in C. R. P. No. 1282 of 1929.

S. V. V.

Pakenham Walsh, J. C. R. P. No. 171 of 1931.
25th October, 1932.

Provincial Small Causes Courts Act (IX of 1887), *Schedule II, Art.* 28—*Suit for recovery of deceased daughter's stridhanam—Father claiming as preferential heir against husband—Suit, if cognizable by a Small Causes Court—Objection not taken in the Lower Court—High Court whether will interfere in revision.*

A suit by the father of a deceased Hindu married woman for the recovery from her husband of the jewels, vessels, etc., presents

made by him to her by way of stridhanam on the ground that her marriage was in the Asura form and that, therefore, the father and not the husband was the heir of her properties, falls under Art. 28 of the second schedule of the Provincial Small Causes Courts Act, 1887 and as such is not cognizable by the Small Causes Court.

49 M. L. J. 554 followed.

27 All. 622 and 19 C. W. N. 614 not followed.

In such a case of total want of jurisdiction even if the jurisdiction of the Court below was not objected to before it, the High Court will interfere in revision, set aside the decree and direct the plaint to be returned for presentation to the proper Court.

41 I. C. 276 followed.

Watrap S. Subrahmania Aiyar for Petitioner.

G. Ramanathan for *N. S. Srinivasa Aiyar* for Respondent.

K. C.

Burn, J. C. M. P. No. 4883 of 1932.

25th October, 1932.

Madras Local Boards Act (XIV of 1920), *S.* 38—*Election Rules, R.* 35—*Candidate's nomination—Cancellation by Local Government—Writ of certiorari moved in High Court for including his name in the list of nominations—Whether the order of the Government could be quashed—Writ of mandamus proper.*

The Local Government under S. 38 of the Local Boards Act and R. 35 of the Election Rules cancelled the nomination of a candidate for election to the District Board though the Election Officer had accepted it and a writ of certiorari was moved in the High Court on behalf of the person whose nomination was rejected, for calling up of the records before the Election Officer and direct the Election Officer to include his name in the list of nominations. The Election Officer and the other candidate were made parties to the petition for writ.

Held, (1) that though writ was asked nominally against the Election Officer still in reality the Government's order it was that was sought to be quashed and this Court has no jurisdiction to question the order of the Local Government. 53 Mad. 979 followed.

(2) The prayer for direction to the Election Officer to include the petitioner's name was more appropriate in a writ for mandamus than in a writ of certiorari and this Court has jurisdiction to issue a writ of mandamus only to officers in the City and even in the City not against the Governor in Council.

A. Visvanatha Aiyar for Petitioner.

The Government Pleader for Election Officer.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for rival candidate.

K. C.

Venkatasubba Rao and Reilly, JJ. C. M. A. No. 420 of 1930
25th October, 1932.

Hindu Religious Endowments Act (II of 1927), *S.* 70*—Order in execution—If appealable—Notice under S.* 70*—Service of, on executive trustee—If enough.*

On failure of the trustees to pay the amounts due under S. 70 of the Endowments Act, the Court on the application of the President of the Board passed an order for payment against the endowment under S. 70. The trustees preferred an appeal against the order under S. 47, Civil Procedure Code.

Held, that the appeal lay. The words in S. 70 "as if a decree had been passed for the amount by the Court" attract to the order the whole procedure in execution and also the right of appeal under S. 47, Civil Procedure Code.

14 M. L. J. 433; 31 Mad. 24; A. I. R. 1929 Lah. 228 and 46 Bom. 128 followed.

40 All. 89 distinguished.

There were eight trustees for the institution and each of them acted by rotation for a period of two years as executive trustee. Notice under S. 70 was served only on the executive trustee then in office.

Held, it was sufficient notice. The true intention is not that the trustee should be served but the institution of which he is the trustee. The funds that are liable under S. 70 are the funds of the institution and what is intended is that no proceedings should be taken against it before a proper notice is served on it. The question in each case therefore is "Has the institution been properly served or not". When by usage one of several trustees acts as the managing or executive trustee, the notice served on such trustee must be deemed to be a proper notice as against the institution.

B. Sitarama Rao for Appellant.

P. Venkataramana Rao, T. Kumarasamiah, M. Lakshman Nayak, M. R. Venkatraman and *S. V. B. Rao* for Respondents.

S. V. V.

Reilly and Venkatasubba Rao, JJ. C. M. A. No. 481 of 1930.
18th October, 1932.

Civil Procedure Code (V of 1908), *S.* 145 *and O.* 21, *Rr.* 95 *and* 97—*Third person surety giving immovable property as security—Execution against surety bringing charged property to sale—Execution purchase of the same property in a prior mortgagee's suit against surety—Sale in execution in pursuance of the security bond subsequently to the first mortgagee's purchase—Proceedings against first mortgagee's purchaser—Order on—Appealability.*

Where in a suit between two persons, a third person gave security of immovable property to the Court for the due discharge of duties by the plaintiff as Receiver and in execution the liability of the Receiver was assessed and the charged property given as security was sought to be sold and ultimately purchased by the defendant in the suit and he applied under O. 21, Rr. 95 and 97 of the Civil Procedure Code to remove the obstruction by a prior mortgage-decree-holder-purchaser whose purchase in execution was subsequent to the proceedings taken against the surety but prior to the purchase by the defendant and the petition was dismissed by the Lower Court,

Held, an appeal lay against the decision of the Lower Court on the principle of 42 All. 158, although the case might not fall within the provisions of S. 145 of Civil Procedure Code.

K. V. Sesha Aiyangar for Appellant.

C. A. Seshagiri Sastri for Respondent.

K. C.

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Pakenham Walsh, J. C. R. P. No. 294 of 1932.
25th October, 1932.

Civil Procedure Code (V of 1908), *O.* 11, *R.* 1—*Interrogatories—Suit on a promissory note—Defence that pronote was given merely as security and not to be enforced—Defendant if entitled to administer interrogatories as to circumstances under which the pronote was executed.*

Where in a suit on a promissory note the plea of the defendant was that the promissory note was not supported by consideration but was given as security for the return of an *othi* deed which the defendant had to return to the plaintiff, but could not do so as it had been filed in Court in a pending suit and interrogatories were sought to be administered by the plaintiff as to the circumstances under which the promissory note came to be executed,

Held, that the burden having been on the defendant until he had let in all the evidence he had in proof of his defence, he was not entitled to have the interrogatories administered.

N. R. C.

41 Cal. 6 distinguished.

Watrap S. Subrahmania Aiyar for Petitioner.

S. Krishnaswami Aiyangar for Respondent.

K. C.

Pakenham Walsh and Bardswell, JJ. L. P. A. No. 75 of 1929.
26th October, 1932.

Partnership—How dissolved—Article of Limitation applicable—Onus to prove dissolution—Plaintiff accepting onus—If can complain in appeal.

A partnership will not be dissolved merely because the business is closed, but it must be dissolved in one or other of the ways known to and recognised by the law.

89 I. C. 122; A. I. R. 1920 All. 378 and 66 I. C. 811 followed.

Where the plaintiff has accepted the onus on the issues as they were framed and evidence was gone into on that basis and the parties proceeded to trial accordingly, it is too late for plaintiff to afterwards complain in appeal that the onus was wrongly thrown on him.

53 M. L. J. 431 followed.

If the suit is for dissolution and taking of accounts of a partnership that had not been dissolved, then Art. 106 will not apply but only Art. 120. But when the suit is brought in respect of a partnership that has already been dissolved, then Art. 106 will apply. It is not open to a plaintiff to bring a suit saying that a partnership still subsists, when it has, in fact, been dissolved and then claim the benefit of Art. 120 on the basis of the untrue contention.

66 I. C. 811 and A. I. R. 1930 Lah. 378 followed.

Dissolution of a partnership at will can be inferred from circumstances. (*See* 36 Mad. 185.)

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Appellant.

K. Krishnaswami Aiyangar for Respondent.

S. V. V.

Burn, J. Cr. R. C. Nos. 590 and 600 of 1932.
3rd November, 1932.

Criminal Procedure Code (V of 1898), *S.* 188, *Proviso* (1)—*Applicability—Charge for offence under Ss.* 379-411, *Indian Penal Code—Offence of theft not proved—Possession of stolen property in French territory proved—Certificate of Political Agent if necessary*.

The accused, who were resident within British limits, were charged under Ss. 379-411, Indian Penal Code, on the ground that they either committed theft or retained the stolen property within the British limits. The offence of theft was not proved but the accused were proved to have been in possession of the stolen property which they had sold in French territory and the property was recovered from the French limits. An objection to the trial having been raised under the first proviso to S. 188, Criminal Procedure Code.

Held, that the charge was for dishonest retention of stolen property in French territory and could not therefore be proceeded with in the absence of a certificate of the Political Agent of the French territory.

V. Rathnam for Petitioner in Cr. R. C. No. 600 of 1932.

R. Somasundaram Aiyar for Petitioner in Cr. R. C. No. 590 of 1932.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

B. V. V.

Venkatasubba Rao and Curgenven, JJ. C. R. P. No. 1112 of 1929.
4th November, 1932.

Specific performance—Decree for—In the nature of preliminary decree—Right of plaintiff and defendant to enforce the decree —Plaintiff in a purchaser's action for specific performance obtaining a decree but not depositing money into Court—Whether defendant can enforce—Suit against vendor and those who bought from him with notice of agreement—Suit decreed—Whether vendor alone can enforce the decree.

A decree for specific performance is in the first instance of a preliminary nature and all further reliefs consequential on the same can be obtained in the action itself. A specific performance decree enures for both the parties and both the plaintiff and the defendant can enforce the same and work out their rights in the action itself.

46 Mad. 148 and 59 Cal. 501 followed.

In a purchaser's action for specific performance where there has been a decree for specific performance, if the plaintiff fails to deposit the amount into Court under the decree, it is open to the defendant to enforce the same. Where, however, a purchaser brought a suit for specific performance against the vendor and other persons

N. R. C.

who bought portions of the property subsequently from the latter with notice of the agreement and a decree for specific performance is passed against the vendor and the purchasers from him, the vendor though he still owns a considerable portion of the property is not entitled to enforce the decree against the will of the purchasers from him.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan, K. S. Venkataramani, R. Somasundaram Aiyar, V. V. Chowdry and *G. S. Venkatarama Aiyar* for Respondents.

K. C.

Curgenven, J. C. R. P. No. 511 of 1932.
4th November, 1932

Civil Procedure Code (V of 1908), *O.* 44—*Application to appeal in* forma pauperis—*Notice to respondent issued—Court if can go into merits of the case after notice—Scope of enquiry after notice.*

A Court is not justified after notice to respondent to examine the question whether the judgment appealed from is or is not contrary to law. It is the duty of the Court to peruse the records before issuing notice and satisfy itself that it is contrary to law or otherwise unjust. Where a preceding Judge ordered notice on the petition and the petition comes on after notice before another Judge, it must be presumed that the first Judge was satisfied about the merits and the successor should have taken it at that stage and enquired only about the pauperism.

6 Pat. 687 and A. I. R. 1929 Pat. 27 followed.

P. Satyanarayana Rao for Petitioner.

A. Venkatachalam for Respondent.

S. V. V.

Venkatasubba Rao, J. S. A. No. 1693 of 1928.
11*th November,* 1932.

Defamation—Absolute privilege—Madras Estates Land Act, S. 75.

A proceeding before a Revenue Inspector under S. 75 of the Madras Estates Land Act is a quasi-judicial proceeding. Hence any defamatory statement made by a party before such an officer against his opponent, even if irrelevant, is absolutely privileged if it be connected with the enquiry on hand.

Gatley on "Slander and Libel," 1924 ed., Ch. XI, pp. 182, 183 and 184, Folkard "Slander and Libel," VII ed., p. 100 and *Seaman* v. *Netherclift,* (1876) 2 C. P. D. 53, relied on.

21 M. L. J. 85 followed.

N. Rajagopalachariar for Appellant.

A. Srinivasa Aiyangar for Respondent.

K. C.

Krishnan Pandalai, J.
2nd November, 1932.

C. M. A. No. 59 of 1931 and
S. A. No. 434 of 1932.

Registration Act (XVI of 1908), *S.* 32—*Presentation of document—Minor claiming under document—Powers-of-Attorney Act,* 1882, *S.* 5—*Applicability to Hindus—Minor married woman—Right to execute power-of-attorney.*

A minor claiming under a document can present the document for registration under S. 32 of the Registration Act.

56 M. L. J. 218 (P. C.) and 33 I. C. 33 referred to.

The Powers-of-Attorney Act, 1882, applies to Hindus also. Under S. 5 of that Act a minor married woman can execute a power-of-attorney as if she were of full age and appoint an agent to present a document for registration.

A. Lakshmayya for Appellant.

M. Appalachari and *K. Ramamurti* for Respondents.

B. V. V.

Venkatasubba Rao, J.
10*th November*, 1932.

C. R. Ps. Nos. 1345 and 1407 of 1928.

Civil Procedure Code (V of 1908), *S.* 73—"*Assets held by a Court*"—*Meaning of—Attachment—Private alienation—Money paid into Court for satisfaction of the decree—Whether assets available for rateable distribution.*

Certain properties were attached by a decree-holder, but the judgment-debtor subsequent to the attachment sold the properties and the vendee paid the money into Court and applied for satisfaction of the decree being recorded. In the meanwhile, before the payment into Court, other decree-holders had applied for execution of their decrees.

Held, that the money paid into Court by the vendee was available for rateable distribution and the attaching creditor was not exclusively entitled thereto.

36 Bom. 156 not followed.

47 Cal. 515 followed.

21 Bom. L. R 975 and 41 Mad. 616 referred to.

B. C. Seshachala Aiyar and *N. S. Srinivasan* for Petitioners.

T. Pattabhirama Aiyar for Respondent.

S. R.

N. R. C.

Madhavan Nair, J.
18*th November*, 1932.

S. A. No. 2251 of 1927.

Hindu Law—Alienation by the daughter of the last male-owner —Reversioner's suit to set aside sale—Consideration binding to a major extent and found not binding to a small extent—Whether reversioner entitled to the amount so found not binding.

A reversioner filed a suit to impeach a sale for a sum of Rs. 400 executed by the daughter of the last male-owner and it was found by the Lower Appellate Court that the consideration to the extent of Rs. 325 was for binding purposes but that Rs. 75 was utilised for a purpose not binding on the reversioner. It was contended for the alienee relying on 49 All. 149 (P. C.) that the sale should be upheld and no equities would arise between the parties.

Held, that the sale should be upheld, but for the portion of the consideration found to be not binding as distinguished from a case where it has not been proved to be binding, the reversioner is entitled to the consideration so found not to be binding on him.

49 All. 149 at 161 (P. C.) referred to and distinguished.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

K. S. Krishnaswami Aiyangar and *N. R. Govindachariar* for Respondent.

K. C.

Curgenven, J. C. R. P. No. 544 of 1931.
7th November, 1932.

Limitation Act (IX of 1908), *S.* 18 *and Art.* 118—*Claim that an adoption was invalid—Adoption known before but the invalidating circumstances learnt within* 8 *months of suit—S.* 18 *if saves limitation.*

Where the mother of the plaintiff made an adoption nearly 40 years ago under the authority given to her by her husband and the plaintiff applied for leave to sue in *forma pauperis* for a declaration that the alleged adoption was not true in fact nor valid in law, alleging that the authority to adopt was not given and that the fact of want of authority was kept back from the plaintiff,

Held, that the Court was justified in dismissing an application to sue in *forma pauperis* on the ground that the plaint did not disclose a subsisting cause of action, as it did not allege that the alleged adoption did not come to the plaintiff's knowledge more than six years prior to suit. S. 18 of the Limitation Act can be invoked only if the knowledge of the alleged adoption had been kept back from the plaintiff and not on the ground that the plaintiff was not aware of or informed of the non-existence of the husband's authority relied on for the adoption.

C. Rama Rao for Petitioner.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

K. C.

Curgenven, J. C. M. S. A. No. 132 of 1928.
23rd November, 1932.

Foreign Court—Ex parte *decree—Decree transferred for execution to British Indian Court—Arrest—Defendant obtaining release on furnishing security—Defendant moving Foreign Court to set aside* ex parte *decree—Dismissal for default—Application to British Indian Court to dismiss execution application—Foreign Court's decree absolute nullity.*

An *ex parte* decree obtained against the defendant in a personal action in the Court of a Native State of India was transferred for execution under S. 44, Civil Procedure Code, to a District Munsif's Court in British India. The defendant was arrested in execution but he obtained his release on his furnishing security with a view to moving the Native State Court to set aside the *ex parte* decree. The defendant subsequently applied to the Native State Court to set aside the decree but the application was dismissed for default of appearance. Then he put in an application to the Court in British India to dismiss the execution petition on the ground that the decree

passed against him in the Foreign Court was by international law a nullity and so could not be executed against him.

Held, (1) that a decree pronounced ***in absentem*** in a Foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity.

22 Cal. 222 : 4 M. L. J. 267 (P. C.) followed.

(2) that the submission to jurisdiction of the Foreign Court must be in the suit itself and before the decree is passed; that the subsequent conduct of the defendant cannot retrospectively validate a decree which was originally a nullity.

8 Lah. 54; (1914) 3 K. B. 145 and 53 All. 747 referred to.

(3) that even if it is assumed that the defendant had submitted to the foreign jurisdiction it cannot be said the submission was voluntary, as he moved that Court only after his arrest in execution of the decree.

39 Mad. 24 and 55 L. J. Q. B. D. 39 referred to.

Leave to appeal granted.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for Respondent.

K. C.

Reilly and Cornish, JJ. A. S. No. 245 of 1926.
2nd December, 1932.

Minor—Suit on promissory note—Promissory note executed by minor's de facto *guardian—Binding purposes—Guardian not a legal or legally appointed one—Whether decree could be passed against minor or his estate.*

No decree can be passed either against a minor or his estate in a *suit on a promissory note* executed by the *de facto* guardian of the minor, (not being a legal or legally appointed guardian), even though the amount was borrowed for purposes binding on the minor under his personal law.

Distinction between suits based on the promissory note and on the consideration for the same pointed out.

42 Mad. 185 (F. B.) considered.

35 L. W. 397 doubted.

R. Gopalasami Aiyangar and *S. Ramanujam* for Appellant.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondent.

K. C.

Krishnan Pandalai, J. C. R. P. No. 1205 of 1932.
3rd November, 1932.

Civil Procedure Code (V of 1908), O. 26, R. 5—Commission to witness—Witness resident in Travancore State but within 200 miles of Court—Commission if should issue.

Though witnesses resident in Travancore State can be served with summons to give evidence in British Indian Courts, yet as there is no means by which such a witness can, if he fails to appear on summons, be compelled to appear, an application for the issue of a commission to examine such a witness should ordinarily be granted. The provisions of O. 16, R. 19 about the two hundred miles limit does not apply to the case of a person outside British India.

C. S. Venkatachariar for Petitioner.

S. Ramaswami Aiyar for Respondent.

S. V. V.

Pakenham Walsh, J. S. A. No. 1098 of 1928.
15th November, 1932.

Ordinance IX of 1914—Madras District Municipalities Act, 1884, Ss. 44 and 45—Void contract by Municipality—Benefit if can be restored—S. 65, Contract Act—Limitation—Acknowledgment by agent—Validity.

Held, that when the statutory requirements for entering into a contract are not complied with, the contract by the Municipality is void.

53 Mad. 352 followed.

In such a case of void contract for breach of statute, S. 65, Contract Act, does not apply and the benefit derived cannot be refunded.

50 Cal. 929 and 45 All. 179 explained.

1930 Mad. 945; 57 M. L. J. 756 and 54 Cal. 189 distinguished.

The Ordinance does not take away the power of the Municipality to contract under the Act.

An agent who is authorised to enter into a contract is also empowered to acknowledge the liability so as to save limitation.

24 C. W. N. 153; 85 I. C. 633 and 2 Rang. 367 followed.

T. Rangachariar and *S. Narayana Aiyangar* for Appellant.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Respondent.

S. V. V.

Reilly and Cornish, JJ. Appeal No. 29 of 1927
22nd November, 1932. and C. M. A. No. 180 of 1927.

Civil Procedure Code (V of 1908), O. 41, R. 33—Power of Appellate Court to re-open against ex parte *defendants—Limits of power.*

In a suit upon a settlement executed by a deceased person against seven persons as in possession of the properties, an *ex parte*

decree was passed, but on an application by 2 to 6 defendants alone, the suit was restored against all the defendants. The High Court revised the order and confined the restoration to the defendants 2 to 6 alone and confirmed the *ex parte* decree against 1 and 7 defendants. After trial, the Trial Court held the settlement deed was not genuine and dismissed the plaintiff's suit On appeal the High Court confirmed the finding that it was not genuine. The question then arose if under O 41, R. 33 the High Court can exercise its powers and cancel also the decree against defendants 1 and 7, who had not appealed and were not parties to the appeal.

Held, that in view of the finding that the settlement deed was not genuine, it would be illogical and inconsistent to retain the decree against 1 and 7 defendants, which was passed on the footing that the settlement deed was genuine; that this was a proper case for the application of O. 41, R. 33 and set aside the decree *in toto* even as against defendants 1 and 7.

53 Mad. 881 (F. B.) and 1 L W. 376 followed.

Case-law discussed.

K. S. Krishnaswami Aiyangar, S. Rajagopalachari and *K. S. Desikan* for Appellant.

S. Varadachariar and *S. Ramaswami Aiyar* for Respondents.

S. V. V.

Krishnan Pandalai, J. S A. No. 1712 of 1928.
29th November, 1932.

Practice and procedure—Civil Procedure Code (V of 1908), S. 35—Costs disallowed by the Trial Court giving reasons—Reversal of by first Appellate Court—Right to—O. 24, R. 4, Civil Procedure Code—How far applicable to mortgage suits.

A mortgagee filed a suit to recover the mortgage money from the mortgagors and the purchaser of the equity of redemption who was directed to pay the mortgage amount under the sale deed, and the purchaser paid the amount into Court which was accepted by the plaintiff as satisfaction in full of his claim. The first Court finding that the plaintiff was most to blame for the litigation directed him to pay the defendant's costs.

Held, The discretion exercised by him in awarding costs ought not to be lightly interfered with by the first Appellate Court without assigning proper reasons. Under S. 35, Civil Procedure Code, award of costs is entirely in the discretion of the Trial Court. O. 24, R. 4, Civil Procedure Code, applies to mortgage claims also.

R. Rajagopala Aiyangar for Appellant.

V. K. Srinivasa Aiyangar for *S. Panchapagesa Sastri* for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. A. S. No. 182 of 1926.
1st December, 1932.

Mortgage—Subrogation—Right to—Third mortgagee paying off first mortgagee without knowledge of the existence of second mortgagee—If entitled to priority.

A third mortgagee was directed by the mortgagor to pay to the first mortgagee out of the consideration for his mortgage and the third mortgagee had then no knowledge of the existence of the second mortgage,

Held, the third mortgagee is entitled to subrogation to the extent to which he has paid the first mortgagee as he is not then paying as the agent of the mortgagor and it is obviously to his benefit. The fact that the mortgagee did not know of the second mortgagee does not matter.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. S. Rajagopalachari* for Appellant.

K. Bhashyam and *T. R. Srinivasan* for Respondent.

S. V. V.

Curgenven, J. S. A. No. 19 of 1929.
1st December, 1932.

Madras Estates Land Act (I of 1908), S. 77—Rent decree execution while suit in Civil Court re *title to Kudivaram pending—* Lis pendens.

Pending a civil suit regarding the right and title to the Kudivaram in certain lands between *A*, the registered pattadar, and *B*, who claimed adversely to him, the landholder filed a suit against *A* and *B* for recovery of arrears of rent. Under S. 77 of the Estates Land Act, he obtained a decree against *A* alone and got the holding sold in execution of that decree. *B's* title was recognised in the civil suit and he brought a suit to set aside the sale in execution of the rent decree as vitiated by *lis pendens* and on the ground that he having been exonerated in the rent suit, he was not affected by the sale.

Held, that the doctrine of *lis pendens* was not applicable to claims such as the landholders' which constitute a first charge on the holding and are therefore paramount to the right of both *A* and *B*.

5 Mad. 371 and 26 M. 230 followed.

1 Pat. 287 distinguished.

Secondly, it is enough if the suit for arrears of rent is filed against the defaulting ryot only who is the registered pattadar and the sale of the holding in execution of a decree obtained against him passes a good title to the purchaser even as against persons who

may own the Kudivaram interests but have not been recognised as pattadars by the landholder.

V. Ramaswami Aiyar for Appellant.

C. S. Venkatachariar for Respondent.

S. V. V.

Burn, J. Cr. R. C. No. 167 of 1932.

2nd December, 1932.

Criminal Procedure Code (V of 1898), Ss. 422 and 545 (b) —Appeal against an order of conviction by accused and payment of compensation under S. 545 (b) to complainant—Notice to complainant necessary.

In an appeal by the accused against an order of conviction under S. 323, Indian Penal Code, wherein compensation is also awarded to the complainant under S. 545 (*b*), Criminal Procedure Code, notice of the date of hearing of the appeal ought to be given to the complainant. Though the omission to give notice is not an illegality, it is clearly a grave irregularity and contrary to all sense of fairness.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Complainant.

A. Nagaswami Aiyar for Accused.

The Public Prosecutor for the Crown.

K. C.

Curgenven, J. S. A. No. 1670 of 1928.

5th December, 1932.

Hindu Law—Sale of minor's lands for discharging father's debts—Consideration found binding up to two-thirds of the amount —Purchase of fresh lands with the balance that did not go for discharging debts of father—Whether sale could be upheld.

A minor sued to set aside a sale effected by his guardian of his properties for a sum of Rs. 600. It was found that out of the consideration a sum of Rs. 400 went in discharge of the debts of the father of the minor and the balance was utilised for the purchase of lands for the minor.

Held, that without deciding the question as to whether sale of lands for the purchase of other lands for the minor will be binding on him or not, the sale, in that it was effected for substantial necessity, must be upheld unconditionally.

49 All. 149 (P. C.) and 51 All. 430 (P. C.) followed.

K. S. Desikan for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondents.

K. C.

[END OF VOLUME LXIII.]